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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER,

vs.

MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 30, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

SUPREME COURT OF THE UNITED STATES

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MANDEL BROTHERS, INC.

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INDEX

	Original	Print
Proceedings before the Federal Trade Commission	1	1
Complaint	2	1
Answer	23	5
Initial decision and order of Hearing Examiner, dated October 5, 1956	80	9
Final order of Federal Trade Commission, dated July 5, 1957	173	28
Opinion of the Federal Trade Commission	177	31
Excerpts from transcript of testimony	193	46
Testimony of Robert L. Camenisch—Direct	193	46
Testimony of Bernard B. Bernstein—Direct	220	62
Commission's Exhibit No. 1—Label	225	64
Commission's Exhibit No. 3—Facsimile of Mandel Bros. Sales Check	226	64
Commission's Exhibit No. 4—Sales slip to R. A. Nelson	227	65
Commission's Exhibit No. 12—Sales slip to J. Keesee	228	66

	Original	Print
Proceedings before the Federal Trade Commission—Continued		
Excerpts from transcript of testimony—Continued		
Commission's Exhibit No. 53—Sales slip to Mrs. C. Dittman	229	66
Respondent's Exhibit No. 1—Ticket identifying type of fur, origin, register number and item number	230	66
Proceedings in the U.S.C.A. for the Seventh Circuit	231	67
Opinion, Parkinson, J.	231	67
Judgment	237	72
Order denying petition for rehearing	238	73
Final decree	239	73
Excerpt from appendix to petitioner's brief—Statement pursuant to Rule 16(b) of the Rules of the United States Court of Appeals for Seventh Circuit	241	75
Order extending time to file certiorari	243	76
Clerk's certificate (omitted in printing)	244	
Order granting certiorari	245	77

[fols. 1-2] **BEFORE FEDERAL TRADE COMMISSION**

Docket No. 6434

In the Matter of MANDEL BROTHERS, INC., a corporation.

COMPLAINT—Issued October 27, 1955

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mandel Brothers, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts, and the Rules and Regulations promulgated under the Fur Products Labeling Act and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

Paragraph One: Respondent Mandel Brothers, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

Paragraph Two: Respondent is now and has been since, August 9, 1952, effective date of the Fur Products Labeling Act, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce as "commerce," "fur," and "fur products" are defined in the Fur Products Labeling Act.

Paragraph Three: Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act.

[fol. 3] Paragraph Four: Certain of said products were misbranded in that they were not labeled in accordance with

the Rules and Regulations promulgated under the Fur Products Labeling Act in the following respects:

(a) Required information was set forth in abbreviated form on labels in violation of Rule 4 of the aforesaid Rules and Regulations;

(b) Required information was mingled with nonrequired information on labels, in violation of Rule 29(a) of the aforesaid Rules and Regulations;

(c) Required information was set forth in handwriting on labels, in violation of Rule 29(b) of the aforesaid Rules and Regulations.

Paragraph Five: Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced as required under the provisions of Section 5(b)(1) of the Fur Products Labeling Act.

Paragraph Six: Certain of said fur products were falsely and deceptively invoiced in that they were not invoiced in accordance with the Rules and Regulations promulgated under the Fur Products Labeling Act in the following respects:

(a) Required information was set forth in abbreviated form on invoices in violation of Rule 4 of the aforesaid Rules and Regulations;

(b) Respondent failed to disclose the required item number on invoices in violation of Rule 40 of the aforesaid Rules and Regulations.

Paragraph Seven: Certain of said fur products were falsely and deceptively advertised, in violation of the Fur Products Labeling Act, in that respondent caused the dissemination in commerce, as "commerce" is defined in said Act, of certain advertisements concerning said fur products, by means of newspapers and by various other means, which advertisements were not in accordance with the provisions of Section 5(a) of the Fur Products Labeling Act, and of the Rules and Regulations promulgated under said Act, and which advertisements were intended to aid and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

[fol. 4] Paragraph Eight: Among and including the advertisements as aforesaid, but not limited thereto, were ad-

vertisements of respondent which appeared in the October 3, 1953, issues of the "Chicago Sunday American," "Chicago Sunday Sun Times," and "Chicago Sunday Tribune" and the October 11, 1954, issue of the "Chicago Daily Tribune," all of which publications have wide circulation in the State of Illinois and in various other States of the United States.

By means of the aforesaid advertisements and through others of the same import and meaning, not specifically referred to herein, respondent falsely and deceptively:

(a) Misrepresented prices of fur products as having been reduced from regular or usual prices, where the so-called regular or usual prices were in fact fictitious, in that they were not the prices at which said merchandise was usually sold by respondent, in the recent regular course of its business, in violation of Rule 44(a) of the aforesaid Rules and Regulations;

(b) Misrepresented by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of said fur products, in violation of Rule 44(b) and (c) of the aforesaid Rules and Regulations.

Respondent, making the pricing claims and representations referred to in subparagraphs (a) and (b) hereof, failed to maintain full and adequate records disclosing the fact upon which such claims and representations were purportedly based, in violation of Rule 44(e) of said Rules and Regulations.

Paragraph Nine: Respondent, in the course and conduct of its business has been and now is engaged in substantial competition in commerce with other firms, corporations, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

Paragraph Ten: The use by the respondent of the aforesaid false, misleading and deceptive statements and representations as alleged in Paragraph Eight hereof has had and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are in fact true and into the purchase of substantial quantities of respondent's fur products by reason of such erroneous and mistaken belief. As a

result thereof substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

[fol. 5] Paragraph Eleven: The aforesaid acts and practices of respondent, as herein alleged, were in violation of the Fur Products Labeling Act, and the Rules and Regulations promulgated thereunder, and constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

Paragraph Twelve: The aforesaid acts and practices of respondent, as herein alleged, were all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

Wherefore, The Premises Considered, the Federal Trade Commission, on this 27th day of October, A. D., 1955, issues its complaint against said respondent.

Notice

Notice is hereby given you, Mandel Brothers, Inc., respondent herein, that the 18th day of January, A. D., 1956, at 10 o'clock is hereby fixed as the time and Federal Trade Commission Office, 226 West Jackson Boulevard, Chicago, Illinois, as the place when and where a hearing will be had before a hearing examiner of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after the service of it upon you. Such answer shall contain a concise statement of the facts constituting the ground of defense and a specific admission, denial or explanation of each fact alleged in the complaint or, if respondent is without knowledge thereof, a statement to that effect.

If respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a

statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearing as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by [fol. 6-22] the hearing examiner. In such answer, respondent may, however, reserve the right to submit proposed findings and conclusions and the right to appeal under Section 3.22 of the Commission's Rules of Practice for Adjudicative Proceedings.

If any respondent elects to negotiate a consent order, it shall be done in accordance with Section 3.25 of the Commission's Rules of Practice.

Failure to file answer within the time above provided and failure to appear at the time and place fixed for hearing shall be deemed to authorize a hearing examiner without further notice to respondent, to find the facts to be as alleged in the complaint, to conduct a hearing to determine the form of order, and, thereafter, to enter an initial decision containing such findings and order.

In Witness Whereof, the Federal Trade Commission has caused this, its complaint, to be signed by its Secretary, and its official seal to be hereto affixed, at Washington, D. C., this 27th day of October, 1955.

By the Commission.

Robert M. Parrish, Secretary.

[fol. 23] BEFORE THE FEDERAL TRADE COMMISSION

Docket No. 6434

In the Matter of MANDEL BROTHERS, INC., a corporation

ANSWER—Filed January 11, 1956

Comes now the respondent Mandel Brothers, Inc., by its attorneys, and answers the complaint herein as follows:

1. Respondent admits the allegations in Paragraph One of the complaint.

2. Answering Paragraph Two of the complaint, respondent admits that it is now and has been since before August

9, 1952, engaged in Chicago, Illinois, in the sale, advertising and offering for sale of fur products as "fur products" is defined in the Fur Products Labeling Act (hereinafter sometimes referred to as the Fur Act). Respondent denies that it has been or is engaged in the introduction into commerce, or in the sale, advertising and offering for sale in commerce, or in the transportation and distribution in commerce, of fur products, as "commerce" is defined in the Fur Act. Respondent is without knowledge or information sufficient to form a belief as to whether, and therefore denies that, [fol. 24] said fur products were made in whole or in part of fur which had been shipped and received in commerce as that term is defined in the Fur Act.

3. Answering Paragraph Three of the complaint, respondent denies that said fur products were misbranded and denies that they were not labeled as required by the Fur Act.

4. Answering Paragraph Four, respondent denies that said fur products were misbranded and denies that they were not labeled in accordance with the Rules and Regulations promulgated under the Fur Act and denies that required information was set forth in abbreviated form on labels or that required information was mingled with non-required information on labels or that required information was set forth in hand-writing on labels.

5. Answering Paragraph Five, respondent denies that certain of said fur products were falsely and deceptively invoiced and denies that they were not invoiced as required under the provisions of the Fur Act.

6. Answering Paragraph Six, respondent denies that certain of said fur products were falsely and deceptively invoiced and denies that they were not invoiced in accordance with the Rules and Regulations promulgated under the Fur Act and denies that required information was set forth in abbreviated form on invoices and denies that it failed [fol. 25] to disclose the required item number on invoices.

7. Answering Paragraph Seven, respondent denies that certain of said fur products were falsely and deceptively advertised and denies that it caused the dissemination in commerce (as defined in the Fur Act) of certain advertisements concerning said fur products which advertisements were not in accordance with the provisions of the Fur Act

and of the Rules and Regulations promulgated thereunder.

8. Answering Paragraph Eight of the complaint, respondent admits that its advertising appeared in the October 11, 1954 issue of the Chicago Daily Tribune, but denies that any advertisements appeared in any issues of the Chicago Sunday American or the Chicago Sunday Sun Times or the Chicago Sunday Tribune dated October 3, 1953. Respondent is without knowledge or information sufficient to form a belief as to the geographic scope of the circulation of said newspapers. Respondent is without knowledge or information sufficient to form a belief as to advertisements designated in the complaint as "others of the same import and meaning, not specifically referred to herein" and therefore denies each and every of the complaint's allegations with respect thereto. Respondent denies that the aforesaid advertisement or advertisements falsely and deceptively misrepresented prices of fur products as having been [fol. 26] reduced from regular or usual prices and denies that the stated regular or usual prices were fictitious. Respondent denies that the aforesaid advertisement or advertisements falsely and deceptively misrepresented the amount of savings to be effectuated by purchasers of said fur products. Respondent denies that it failed to maintain full and adequate records disclosing the facts upon which were based the pricing claims and representations in the aforesaid advertisement or advertisements.

9. Answering Paragraph Nine, respondent admits and asserts that it is engaged in competition with others engaged in the sale of fur products to members of the purchasing public. Respondent denies that such competition is in commerce as defined in the Fur Act.

10. Answering Paragraph Ten, respondent denies that it used false, misleading or deceptive statements and representations as alleged in Paragraph Eight. Respondent denies that any of its actions have had or have the tendency and capacity to mislead and deceive any portion of the purchasing public in any wise. Respondent denies that any trade has been unfairly diverted to it from its competitors and denies that any injury has been or is being done to competition.

11. Answering Paragraph Eleven, respondent denies that any act or practice of respondent was in violation of the

[fol. 27] Fur Products Labeling Act or of the Rules and Regulations promulgated thereunder, and denies that any act or practice of respondent constituted unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

12. Answering Paragraph Twelve, respondent denies that any act or practice of respondent was to the prejudice or injury of the public or of respondent's competitors, and denies that any act or practice of respondent constituted unfair or deceptive acts or practices or unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

13. Respondent denies, generally and specifically, each and every allegation contained in the complaint not hereinbefore admitted, qualified or denied.

14. Respondent denies that, at any time pertinent herein, it was engaged in commerce which, under the Constitution of the United States, the Congress is empowered to regulate, or in commerce which the Federal Trade Commission is authorized to regulate, or in commerce as that term is defined in the Fur Products Labeling Act or the Federal Trade Commission Act.

[fols. 28-79] Wherefore, respondent prays that the complaint be dismissed.

Hopkins, Sutter, Owen, Mulroy & Wentz. William G. Blood. James J. McClure, Jr., One North La-Salle Street, Chicago 2, Illinois. Samuel H. Horne, Munsey Building, Washington 4, D. C. Attorneys for Respondent.

Dated: January 11, 1956.

[fol. 80] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Initial Decision

In the Matter of MANDEL BROTHERS, INC., a corporation

INITIAL DECISION AND ORDER OF HEARING EXAMINER—October 5, 1956

Robert L. Piper, Hearing Examiner.

William A. Somers, Esq., for the Commission

Hopkins, Sutter, Owen, Mulroy & Wentz, by William G. Blood, Esq., and James J. McClure, Jr., Esq., of Chicago, Illinois, for respondent.

Statement of the Case

On October 27, 1955, the Federal Trade Commission issued its complaint against Mandel Brothers, Inc. (hereinafter called respondent), charging respondent with misbranding and falsely and deceptively invoicing and advertising certain fur products in violation of the provisions of the Fur Products Labeling Act (hereinafter called the Fur Act), 15 U.S.C. 69(a), *et seq.*, and Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint, together with a notice of hearing were duly served upon respondent.

The complaint alleges in substance that respondent (1) misbranded certain of its fur products by not labeling them as required under the Fur Act and the Rules and Regulations promulgated thereunder; (2) falsely and deceptively invoiced certain fur products in violation of the Fur Act [fol. 81] and said Rules and Regulations; (3) falsely and deceptively advertised certain fur products by misrepresenting the prices as having been reduced from regular or usual prices, and by means of comparative prices, as having a certain value, in violation of the Act, the Fur Act and Rules and Regulations; and (4) failed to maintain adequate records upon which such price and value representations were based, in violation of the Rules and Regulations. Respondent appeared by counsel and filed an answer admitting the

corporate and competition allegations of the complaint, but denying the jurisdictional allegations and all alleged violations of the Act, the Fur Act and the Rules and Regulations.

Pursuant to notice, hearings were thereafter held on April 12 and June 7, 1956, in Chicago, Illinois, before the undersigned hearing examiner duly designated by the Commission to hear this proceeding. Prior to the initial hearing, respondent's motion to strike the complaint upon the grounds that the Rules and Regulations promulgated by the Commission under the Fur Act were invalid, that the Fur Act was unconstitutional, that the complaint was so vague and uncertain as to make responsive pleading impossible, and that the complaint failed to allege sufficient facts concerning commerce to vest the Commission with jurisdiction, was denied.

All parties were represented by counsel, participated in the hearings and afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons therefor. All parties waived oral argument and pursuant to leave granted thereafter filed proposed findings of fact, conclusions of law and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded, are herewith specifically rejected.[1]

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

Findings of Fact

I. The Business of Respondent

The complaint alleged, respondent admitted, and it is found that respondent is a corporation organized and existing under and by virtue of the laws of the State of [fol. 82] Delaware, with its principal office and place of business located at 1 North State Street, Chicago, Illinois.

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[1] 5 U.S.C. § 1007(b)

II. Interstate Commerce and Competition

The complaint alleged, respondent denied, and it is found that respondent is now and has been since August 9, 1952, the effective date of the Fur Act, engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products, and has sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as "commerce", "fur" and "fur products" are defined in the Fur Act.

In this connection, as noted above, respondent denies that it is engaged in commerce within the meaning of the Fur Act, or that it sold, advertised, offered for sale, transported or distributed fur products made in whole or in part of fur which had been shipped and received in commerce. However, the record establishes that respondent advertised its fur products in commerce, sold fur products to customers from outside the State of Illinois and subsequently delivered such products to such customers outside the State of Illinois, and purchased and had shipped to it in the State of Illinois fur products from the State of New York.

Respondent advertised its fur products in The Chicago Tribune, The Chicago American, and The Chicago Sun-Times, newspapers with substantial circulation outside the State of Illinois. In addition, the record reveals a number of sales by respondent to customers outside the State of Illinois. While these sales were made at the Chicago store, respondent's officials admitted that, because no Illinois sales tax was charged, the products must have been delivered by respondent to such customers outside the State of Illinois. The foregoing facts are substantially identical to those considered by the Commission in the *Pelta Furs* case,[2] wherein the Commission, although in disagreement concerning the authority for Rule 44 of the Rules and Regulations under the Fur Act, unanimously agreed that the respondents therein were engaged in "commerce" within the meaning of the Act and the Fur Act.

[fol. 83] Based upon the above undisputed facts, it is further concluded and found that respondent is engaged in

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[2] *Pelta Furs*, Docket No. 6297 (1956)

commerce within the meaning of the Act, and that, in the course and conduct of its business, respondent is in substantial competition in commerce with other corporations, firms, copartnerships and individuals also engaged in the sale of fur products to members of the purchasing public.

III. The Unlawful Practices

A. Misbranding of Fur Products

The complaint alleged that respondent misbranded certain fur products by not labeling them as required under the provisions of Section 4(2) of the Fur Act and Rules 4, 29(a) and 29(b) of the Rules and Regulations. More specifically, Section 4(2) of the Fur Act requires labels on fur products showing: (a) the name of the animal as set forth in the Fur Products Name Guide promulgated by the Commission pursuant to Section 7 of the Fur Act; (b) that the fur is used; (c) that the fur is bleached, dyed, or otherwise artificially colored; (d) that the product is composed of paws, tails, etc.; (e) the name or other identification of the person who manufactures or sells the product; and (f) the country of origin of any imported fur.

Counsel supporting the complaint proposed no findings, and there is no proof in the record, with respect to any violation of (b) and (d) above. Accordingly no such violations are found. With respect to (a), (c) and (f) above, there is no substantial dispute in the record. The record reveals some 12 instances of failure to label the fur products with the correct name of the animal producing the fur as set forth in the Fur Products Name Guide, some 15 instances of failure to disclose in the labels that the product was bleached, dyed or otherwise artificially colored, and some 58 instances of failure to disclose the country of origin of imported furs. With respect to the alleged violations of the aforesaid rules concerning labeling, the record establishes some 9 instances of required information being set forth in abbreviated form contrary to Rule 4, some 59 instances of mingling non-required information with required information in violation of Rule 29(a), and some 119 instances of required information being set forth in handwriting in violation of Rule 29(b).

While not disputing any of the foregoing violations, re-

spondent argues that they are merely technical and trivial in
[fol. 84] nature, and accordingly the public interest does
not warrant the issuance of a cease and desist order.

Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.

In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act.

Although the complaint alleged, and counsel supporting the complaint proposed a finding, that respondent failed to attach labels to its fur products showing its name, as required by subsection (e) of Section 4(2) of the Fur Act as paraphrased above, the record establishes that respondent did not in fact fail to so label its products. Mr. Camenisch, an investigator for the Commission, testified that he found no instances where respondent's name was not set out on its labels. Commission Exhibit 1 is a facsimile of the form of label used by respondent. Printed thereon in large type are the words "Mandel Brothers, Chicago". Mr. Camenisch testified that the correct name of respondent is Mandel Brothers, Inc., and apparently the proposed finding of counsel supporting the complaint

is based upon the failure to include the word "Inc.", even though it is undisputed that respondent placed its name and city of location upon all of its labels. I find no merit in this proposal of counsel supporting the complaint. Subsection (e) of Section 4(2) requires that the label show plainly: "The name, or other identification issued and registered by the Commission, of one or more of the persons [fol. 85] who manufacture such fur product . . . , introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce." Respondent has complied with this requirement literally. In addition, it included the city where it does business, more information than necessary under the subsection. The failure to attach the word "Inc." seems to me completely without significance. Respondent plainly set forth the name under which it does business and its location. To construe the omission of Inc., which respondent does not normally use as a part of its name in doing business, as a violation of the Fur Act seems to me entirely too technical and unreasonable.

B. False Invoicing of Fur Products

The complaint alleged that respondent falsely invoiced certain of its fur products in violation of Section 5(b)(1) of the Fur Act and Rules 4 and 10 of the Rules and Regulations. Section 5(b)(1) requires that the invoices show: (a) the name of the animal as set forth in the Fur Products Name Guide; (b) the presence of used fur; (c) that the fur product is bleached, dyed or otherwise artificially colored; (d) that the fur product is composed of paws, tails, etc.; (e) the name and address of the person issuing the invoice; and (f) the country of origin of any imported fur. In support of these allegations, counsel supporting the complaint offered in evidence certain invoices issued by respondent to purchasers of its fur products. These contained four instances of failure to set forth the correct name of the animal as contained in the Fur Products Name Guide, and six instances of failing to set forth that the fur in the product was bleached, dyed or otherwise artificially colored. With respect to subparagraph (e) as set forth above, respondent's invoices show that, while its

name is set forth thereon, no address is included as required by subsection (e).

Counsel supporting the complaint proposed a finding of fact under subsection (d) above, but there is no evidence in the record that respondent's invoices ever failed to show that the fur products were composed of paws, tails, etc. when such was the fact, as required by subsection (d), and accordingly no such finding is made. Counsel supporting the complaint proposed no findings of fact with respect to subparagraphs (b) and (f) of Section 5(b)(1) as set forth above, and there is no proof in the record in support of these allegations. Accordingly, no finding will be made. With respect to the alleged invoicing violations of Rules 4 and 40 which provide respectively that required information not be abbreviated and that the invoice disclose [fol. 86] the item number of the fur product, counsel supporting the complaint proposed no findings of fact, there is no proof in the record to sustain such allegations, and no such findings are made.

C. False Advertising of Fur Products

The complaint alleged that respondent falsely and deceptively advertised its fur products in violation of the Fur Act, of Rules 44(a), (b) and (c), and of the Act, by newspaper advertisments which represented that the prices of its fur products had been reduced from their regular and usual prices when in truth and in fact such so-called regular or usual prices were fictitious, and by newspaper advertisements which represented that the sale prices of its products enabled purchasers to effectuate savings greater than the difference between such prices and current market value. Rule 44(a) prohibits such fictitious pricing and Rules 44(b) and (c) prohibit such comparative pricing and value claims unless based upon current market values or the time of such compared prices is given and such claims are true in fact. It is of course well established that such false representations in commerce concerning prices and value are violations of Section 5 of the Act.[3]

[3] *The Orloff Company, Inc.*, Docket No. 6184 (1956), and cases cited therein.

The record establishes that respondent by its newspaper advertising misrepresented its regular and usual prices, and misrepresented the market price or value of its fur products. Four newspaper advertisements of respondent were received in evidence, two from the Chicago Sun-Times and Chicago American on October 3, 1954, one from the Chicago Tribune on October 2, 1954, and the other from the Chicago Tribune on October 5, 1952.

1. The Comparative Pricing

The alleged misrepresentation concerning the market price or value of respondent's products is considered first. Respondent operated two fur departments in its Chicago store, one called the Subway Fur Department in the basement and the other on the fifth floor called the Fur Salon. Respondent annually each October conducts a sale in its Subway Department during which hundreds of fur coats, jackets and other garments are sold at a single price of $125.00 each. Respondent has been conducting this particular promotion for many years. The two advertisements [fol. 87] dated October 3, 1954, and the advertisement dated October 5, 1952, dealt with this particular annual sale of fur products. The 1954 advertisements contain a long list of fur garments of different types of furs with a corresponding list of market prices ranging from $195.00 to $499.00 each, all for sale at the single price of $125.00. The 1952 advertisement was substantially the same except that the market prices listed ranged from $165.00 to $599.00. In addition, the 1952 advertisement also stated that many of the fur products on sale were reduced from respondent's own stock.

The record establishes that the market price or value of the fur products advertised by respondents in 1952 and 1954 did not equal or approach $599.00 and $499.00, respectively. Commission Exhibits 25 through 46 are respondent's invoices showing sales made during the 1954 Subway Fur sale, together with the receiving aprons and manufacturers' invoices tied to each such sale invoice showing the original cost of each garment and also listing respondent's retail prices thereon as $125.00. These exhibits reveal that the cost of the fur products sold by respondent during the 1954 Subway sale ranged from $83.00 to approximately

$100.00 a unit. Commission Exhibits 55 through 60 are manufacturers' invoices of fur products purchased by respondent for its 1952 Subway sale and show costs ranging from $87.50 to $100.00 a garment. Counsel supporting the complaint called Messers. Himmel and Friedman, two experienced furriers engaged in the business in Chicago for many years, who both testified that the average mark-up in the fur industry was 60 per cent of the cost or 37½ per cent of the retail price. Mr. Friedman testified that the maximum range of mark-up was from 50 to 70 per cent of the cost. Respondent offered no evidence to contradict this testimony and accordingly it is undisputed in the record. Computing the maximum mark-up used in the industry, 70 per cent, upon the maximum cost of any of the garments listed in the foregoing exhibits would result in $170.00 as the highest market value of any of the fur products.

Messers. Hill and Bernstein were the buyers for and in charge of the Fur Salon and the Subway Department, respectively. They testified that they made frequent buying trips to New York City and, by careful shopping and buying in lots rather than individual pieces, were able to acquire fur products at prices substantially less than they could be purchased by competitors in single units.

Messers. Hill and Bernstein also testified that the market prices listed in the three advertisements above mentioned were true and correct. For a number of reasons, this testimony cannot be credited. Based upon this and proof [fol. 88] that respondent's mark-ups averaged from 5 to 10 per cent less than the usual mark-up of 37½ per cent of retail price, respondent argued that the market prices contained in its advertisements were in fact correct. While this would result in lower prices to the public, as contended, it by no means establishes the truth of the market value representations. As heads of the respective departments, Messers. Hill and Bernstein either prepared or supervised the preparation of respondent's newspaper advertisements. Self-interest would dictate that they testify that such advertisements were true and correct in all respects. More conclusively, the facts established by the documentary evidence in the record reveal that the market values listed in the advertisements could not possibly have been true.

As previously noted, a maximum mark-up applied to the fur products, costing the most would have resulted in a market price of only $170.00. Based upon the highest cost of the fur products, a mark-up of 400 to 500 per cent would have been necessary to reach the market prices of $499.00 and $599.00 listed in respondent's advertisements. In view of the testimony of Messers. Himmel and Friedman, both of whom had many years of experience in the fur business and were president and secretary, respectively, of the Associated Fur Industries of Chicago, such a mark-up would be incredible.

The argument that because respondent purchased its fur products in lots or large quantities it was able to secure them at cost prices 400 to 500 per cent below market value is equally incredible. With regard to this, it will be noted that both Messers. Hill and Bernstein testified that they were able to purchase such products at a cost considerably lower than buying each garment individually. Respondent's argument assumes that competitors could buy fur products only as individual items, an assumption which obviously is not sound. Mr. Himmel testified that his firm operated the largest exclusive fur building in Chicago and was also engaged in manufacturing. The market price or value of a product must be the average price at which such products are sold in the industry at retail. Here this necessarily means the price at which competitors of respondent were selling such products on the retail market in Chicago. To assume that such competitors could and did purchase their fur products wholesale only individually or in small units instead of lots could hardly be accurate, yet this is the tenor of respondent's argument.

Actually, respondent's invoices demonstrate the invalidity of this argument. An examination of them reveals that, contrary to its contention concerning buying in quantity, the lowest cost prices appear on the invoices involving the smallest number of fur products. For example, Com- [fol. 89] mission Exhibit 29 involving the purchase of eight garments to be sold for $125.00 shows the cost thereof to be $84.00 a piece. Similarly, Exhibits 40, 42, and 44, involving the purchase of only 14, 17 and 21 garments, respectively, shows the cost to be $83.00 per garment. Conversely, many of the invoices covering a purchase of

substantially larger numbers of fur garments show a higher cost per item. It can hardly be contended seriously that respondent's competitors, including the largest exclusive furrier in Chicago, could not purchase lots of fur garments wholesale in quantities ranging from 8 to 21. In view of these established facts, respondent's advertised market prices representing a mark-up of 400 to 500 per cent above cost cannot be true.

Another point worth noting in this connection is that if respondent's market prices or values of $499.00 to $599.00 were correct, the cost of such products to respondent's competitors must have ranged from approximately $300.00 to $350.00 per unit, and they could have effectuated great savings and substantial profits merely by purchasing such garments from respondent for $125.00 during its sale. Respondent also argued that there was no proof in the record that the garments identified by invoice were those advertised. Actually the converse is true. Mr. Bernstein testified that respondent never used the $125.00 price except during its Annual sale, and hence the identified garments must have been those advertised. For all of the foregoing reasons, it is concluded and found that respondent's representations concerning the market price or value of its fur products listed in the foregoing advertisements were false.

2. The Fictitious Pricing

The complaint also alleged that respondent falsely represented its usual and regular prices of such products. The proof in support of this allegation was the representations made in the advertisement in The Chicago Tribune dated October 2, 1954, Commission Exhibit 47. This advertisement dealt with a sale of fur products by respondent in its Fur Salon. It stated that the fur products on sale at $244.00 were "Usually $299.00 to $399.00." This interpretation is corroborated by the testimony of Mr. Camenisch, who contacted Mr. Hill with respect to this advertisement and asked him if he could point out the particular garments advertised. According to Mr. Camenisch, Mr. Hill replied that he had no definite record of the particular garments but suggested that Mr. Camenisch check the sales records to find any garments sold at that price pursuant to the advertisement to ascertain the validity of the claims made therein. If it be

[fol. 90] contended that the advertisement was a representation of market value rather than respondent's usual and regular prices, Mr. Hill, who prepared the advertisement and was contacted by Mr. Camenisch, could have at that time made that fact clear. Instead, however, Mr. Hill suggested that Mr. Camenisch check respondent's sales records to locate any particular garments sold by it pursuant to that advertisement. This testimony was undenied although Mr. Hill testified on two occasions. It seems clear, therefore, in addition to the wording of the advertisement itself, that respondent was representing and intended to represent that the usual and regular prices of these products were from $299.00 to $399.00.

Mr. Camenisch proceeded to check the sales records and found three sales invoices of garments sold pursuant to that advertisement. Such sales invoices and the corresponding manufacturers' invoices of the particular garments were received in evidence. The manufacturer's invoices show that at the time respondent purchased these garments it priced them for sale at retail at $244.00, $244.00 and $288.00, respectively. Respondent's officials testified, and it was undisputed, that in connection with all of the manufacturers' invoices and receiving aprons received in evidence, respondent entered thereon its retail price to be charged for the particular garments and such price was not thereafter changed. This demonstrates that the garments sold were not usually and regularly priced by respondent for sale at from $299.00 to $399.00. Accordingly, it is concluded and found that respondent, by the above advertisement concerning the sale in the Fur Salon, falsely represented its usual and regular prices of such products.

3. The Failure to Maintain Records Concerning Pricing Claims and Representations

The complaint also alleged that respondent failed to maintain full and adequate records disclosing the facts upon which the pricing claims and representations discussed above were based, in violation of Rule 44(e). Rule 44(e) provides that persons making pricing claims or representations of the types described in subsection (a), (b) and (c) thereof, namely, fictitious and comparative pricing, must maintain full and adequate records disclosing the facts upon

which such claims or representations are based. Mr. Camenisch testified that he asked both Messrs. Hill and Bernstein for such records but that none were produced or available, and that respondent's inventory records indicated that the garments advertised never had such value or price, as previously found herein. This testimony was undisputed and accordingly it is found that respondent failed to maintain the records supporting its pricing claims required by Rule 44(e).

[fol 91] D. Respondent's Contentions and Defense

Respondent's contention concerning the triviality and technicality of its labeling violations, and its contention with respect to interstate commerce within the meaning of the Act and the Fur Act, have previously been considered herein. In addition, respondent contended that the requirements of the Fur Act with respect to invoicing do not apply to a person engaged in the retail sale of fur products because of the definition of "invoice" in Section 2(f). This section provides that: "The term 'invoice' means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person *who is engaged in dealing commercially in fur products or furs.*" (Emphasis supplied by respondent.)

Because of the italicized portion of the foregoing definition, respondent contends that the term "invoice" applies only to wholesalers, manufacturers and jobbers, but not to retailers. The gist of respondent's argument is that because of the foregoing language an invoice as defined can apply only to a purchaser who is engaged in dealing commercially in fur products or furs. Such a construction of Section 2(f) appears far too limited in view of the undisputed purpose of the Fur Act to protect the ultimate consumer from deception by false invoicing. It is clear that the Commission has not so construed the meaning of invoice under Section 2(f). The various rules and regulations adopted by the Commission dealing with invoicing clearly indicate that the Commission considers the invoicing requirements of the Act applicable to retailers of fur products

who sell to the purchasing public. In addition, decisions of the Commission, including the *Pelta Furs* case,[4] establish that the Commission has applied the invoicing requirements of the Act to retailers selling fur products to the public.

Respondent also argued that Rule 44 is *ultra vires* as an unwarranted extension of the power delegated to the Commission by the Fur Act. This identical issue was considered by the Commission in the *Pelta Furs* case,[5] in which the Commission held that Rule 44 was an appropriate exercise of the Commission's power under Sections 8(b) and 5(a)(5) of the Fur Act. Respondent also contended that Rule 44 cannot operate to shift the burden of proof to respondent. Apparently this contention is based upon respondent's [fol. 92] belief that there is no proof in the record to sustain the allegations of fictitious and comparative pricing, and that therefore the position of counsel supporting the complaint must be that respondent is required to show that its alleged fictitious and comparative prices were in fact not fictitious and were in fact true market values, respectively. Of course respondent's contention that Rule 44 cannot operate to shift the burden of proof to it is correct. However, no such position was taken by counsel supporting the complaint, and the record does not support respondent's belief. As previously found, counsel supporting the complaint established by reliable, probative and substantial evidence that respondent's pricing representations were in fact false and fictitious. The burden of proof to establish any alleged violation of the Act or the Fur Act is always upon counsel supporting the complaint, and in this proceeding counsel has clearly met that burden.

The fact that Rule 44(e) requires persons making price representations to maintain records supporting such representations does not operate to shift the burden of proof to such persons. Obviously, proof that a respondent did not maintain such records, while it would establish a violation of Rule 44(e), would not be sufficient to establish a violation of Rule 44(a), (b), or (c), and the burden of proving that a respondent's price representations were in fact fictitious or false would still be upon counsel supporting the complaint.

[4] See Footnote 2, *supra*.

[5] See Footnote 2, *supra*.

The record establishes the pricing allegations of the complaint and accordingly respondent's argument in this respect is without merit.

E. Concluding Findings

As previously found, there is no evidence in the record that respondent misbranded its fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, etc., or the name of the person selling, advertising, transporting, or distributing such products in commerce, as alleged in the complaint, nor was there any evidence in the record that respondent falsely invoiced its fur products by failing to show thereon that the fur was used, that the fur was composed of paws, tails, etc., or the country of origin of any imported furs, or by abbreviating required information or failing to disclose the required item number, as alleged in the complaint. Accordingly, it is found that there is no substantial evidence in the record to support the foregoing allegations of the complaint.

A preponderance of the reliable, probative and substantial evidence in the entire record convinces the undersigned, [fol. 93] and accordingly, it is found, that respondent misbranded certain of its fur products by failing to affix labels thereto showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) The name of the country of origin of any imported furs used in the fur product; and

(c) That the fur product contained or was composed of bleached, dyed or otherwise artificially colored fur, when such was the fact.

It is further concluded and found that respondent falsely and deceptively invoiced fur products by failing to furnish invoices to purchasers showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide, and as prescribed under the Rules and Regulations;

(b) That the fur product contained or was composed of bleached, dyed, or otherwise artificially colored fur when such was the fact; and,

(c) The address of the person issuing such invoices.

It is further concluded and found that respondent falsely and deceptively advertised fur products by the use of advertisements and representations which were intended to and did aid, promote and assist, directly or indirectly, in the sale and offering for sale of such products, and which represented, directly or by implication, that (1) its sale prices were reduced from the regular or usual prices of its fur products, when in truth and in fact such represented regular and usual prices were in excess of the prices at which respondent had usually and customarily sold such products in the recent regular course of its business; and (2) its sale prices enabled purchasers of its fur products to effectuate [fol. 94] savings greater than the difference between the stated price and the current market price of such products, in violation of both the Fur Act and the Act.[6]

It is further concluded and found that respondent, in making the pricing claims and representations hereinabove found, failed to maintain full and adequate records disclosing the facts upon which such claims and representations were based, in violation of Rule 44(e) of the Rules and Regulations.

F. The Effect of the Unlawful Practices

The use by respondent of the false, misleading and deceptive statements and representations found above in Section III, Cl. 2 and E has had and how has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public and thereby induce the purchase of substantial quantities of respondent's fur products. As a result, substantial trade in commerce has been unfairly diverted to respondent from its competitors and substantial injury has been and is being done to competition in commerce.

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[6] While the Commission disagreed concerning the validity of Rule 44 under the Fur Act in the *Pelta Furs* case, *supra*, it unanimously held such practices to be in violation of Section 5 of the Act.

Conclusions of Law

1. Respondent is engaged in commerce, and engaged in the above found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act and in the Fur Act.

2. The acts and practices of respondent hereinabove found are in violation of the Fur Act and the Rules and Regulations promulgated thereunder, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Act.

3. The acts and practices of respondent found in Section III C1, 2 and E are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair [fol. 95] methods of competition and unfair and deceptive acts and practices within the intent and meaning of the Act.

4. This proceeding is in the public interest, and an order to cease and desist the above-found unlawful practices should issue against respondent.

5. Respondent has not, as alleged in the complaint, violated the Fur Act or the Rules and Regulations by misbranding fur products by failing to affix labels showing that the fur was used, that the fur was composed of paws, tails, bellies or waste fur, or respondent'se name, or falsely invoiced fur products by failing to show that the fur was used, that the fur was composed of paws, tails, bellies or waste fur, the country of origin of imported furs, the required item number, or by abbreviating required information.

Order

It Is Ordered that respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of fur products in commerce, as "commerce" is defined in the Federal Trade Commission Act, or in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and

received in commerce, as "commerce" "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

[fol. 96] A. Misbranding fur products by failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact; and

(c) The name of the country of origin of any imported furs used in the fur product.

B. Setting forth, on labels attached to fur products:

(a) Non-required information mingled with required information; and

(b) Required information in abbreviated form, or in handwriting.

C. Falsely or deceptively invoicing fur products by failing to furnish invoices to purchasers showing:

(a) The name or names of the animal or animals pro-[fol. 97] ducing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the Rules and Regulations;

(b) That the fur product contains or is composed of bleached, dyed, or artificially colored fur when such is a fact; and

(c) The name of the country of origin of any imported furs used in the fur product.

D. Falsely or deceptively advertising fur products, through the use of any notice, advertisement, or public announcement which does or is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication:

(1) By the use of the word "usually" or in any other manner, that the regular or usual price of any fur product

is any amount in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

(2) The savings to be effectuated by purchasers, by means of percentage savings claims or comparative prices, [fols. 98-172] unless such claims or prices are based upon the current market value of the fur product or upon a bona fide compared price at a designated time.

E. Making pricing claims or representations of the type referred to in paragraphs C (1) and (2) above unless respondent maintains full and adequate records disclosing the facts upon which such claims or representations are based.

It Is Further Ordered that the allegations of the complaint that respondent misbranded fur products by failing to affix labels thereto showing that the fur was used, that the fur was composed of paws, tails, etc., and the name of the person who sold, advertised, transported, or distributed such products in commerce; and that respondent falsely and deceptively invoiced fur products by failing to furnish invoices showing that the fur was used, that the fur was composed of paws, tails, etc., the country of origin of imported furs, the required item number, and by setting forth required information in abbreviated form be and hereby are, dismissed.

ROBERT L. PIPER,
Hearing Examiner.

October 5, 1956.

[fol. 173] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait.

In the Matter of MANDEL BROTHERS, INC., a corporation

FINAL ORDER—July 5, 1957

Respondent and counsel supporting the complaint having filed cross-appeals from the hearing examiner's initial decision filed October 9, 1956, and the matter having come on to be heard by the Commission upon the whole record, including briefs and oral argument, and the Commission having rendered its decision granting in part and denying in part the appeal of respondent and granting the appeal of counsel supporting the complaint and directing modification of the initial decision:

It Is Ordered that Paragraph 5 of the conclusions of law contained in the initial decision be modified to read as follows:

"5. There is no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name or that the invoices issued by respondent in connection with the sale of fur products were deficient in that they failed to disclose that the fur products were composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose the country of origin of imported furs, or the required item number, or that said invoices were improper in that they abbreviated required information."

[fol. 174] It Is Further Ordered that the following order be, and it hereby is, substituted for the order contained in the initial decision:

"It Is Ordered that respondent, Mandel Brothers, Inc., a corporation, and its officers, representatives,

agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which has been shipped and received in commerce, as 'commerce,' 'fur' and 'fur products' are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

"A. Misbranding fur products by:

"1. Failing to affix labels to fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(d) That the fur products is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

[fol. 175] "(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce; and

"(f) The name of the country of origin of any imported furs used in the fur product.

"2. Setting forth on labels attached to fur products:

"(a) Required information in abbreviated form or in handwriting;

"(b) Non-required information mingled with required information.

"B. Falsely or deceptively invoicing fur products by:

"1. Failing to furnish invoices to purchasers of fur products showing:

"(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

"(b) That the fur product contains or is composed of used fur, when such is the fact;

"(c) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

"(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

[fol. 176] "(e) The name and address of the person issuing such invoices;

"(f) The name of the country of origin of any imported furs contained in the fur product.

"2. Setting forth required information in abbreviated form.

"3. Failing to show the item number or mark of fur products on the invoices pertaining to such products.

"C. Falsely or deceptively advertising fur products, through the use of any advertisement, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which respondent has usually and customarily sold such products in the recent regular course of its business;

"D. Making pricing claims or representations of the type referred to in Paragraph C above, unless there is maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based."

It Is Further Ordered that the initial decision of the hearing examiner, as so modified, be, and it hereby is, adopted as the decision of the Commission.

It Is Further Ordered that the respondent, Mandel Brothers, Inc., shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in wrting, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

By the Commission. Commissioner Tait concurring in the result.

Robert M. Parrish, Secretary.

Issued: July 5, 1957.

[fol. 177] BEFORE FEDERAL TRADE COMMISSION

Docket No. 6434

Commissioners: John W. Gwynne, Chairman, Robert T. Secrest, Sigurd Anderson, William C. Kern, Edward T. Tait

In the Matter of MANDEL BROTHERS, INC., a corporation.

OPINION OF THE COMMISSION—July 5, 1957

By Anderson, Commissioner:

Respondent has appealed from the hearing examiner's initial decision which found that it had violated the Fur Products Labeling Act and the rules and regulations promulgated thereunder in that, in certain respects, it had misbranded, falsely invoiced, and falsely advertised fur products sold by it. Respondent's appeal essentially is to the effect (a) that the Commission lacks jurisdiction and (b) that Rule 44 of the Fur Regulations is *ultra vires* the Commission's powers under the Fur Act. Respondent also questions whether the evidence supports the findings as to misbranding, false invoicing and false advertising.

Counsel in support of the complaint have also appealed, questioning the limited scope of the order to cease and desist in the initial decision insofar as the prohibitions against misbranding and false invoicing are concerned. They deem the order to be satisfactory insofar as the advertising violations are concerned.

Respondent's first contention, in effect, is that the evidence does not support the finding that respondent, Mandel

[fol. 178] Brothers, Inc., is subject to the Commission's jurisdiction under the Fur Act and the Federal Trade Commission Act. Under Section 3(a) of the Fur Act, the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced within the meaning of the Fur Act or the rules and regulations promulgated thereunder is unlawful and is an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. Section 4 of the same Act provides that for the purposes of the Act a fur product shall be considered to be misbranded if there is not affixed thereto a label showing the proper name of the animal producing the constituent fur; that it contains used fur, when such is the fact; that it contains bleached, dyed, or otherwise artificially colored fur, when such is the fact; that it contains paws, tails, bellies or waste fur, when such is the fact; the name or other identification of the person who manufactured it for introduction into commerce, who introduced it into commerce or who sells, advertises or offers it for sale, or transports or distributes it in commerce; and the name of the country of origin of the constituent fur; and Sections 5(a) and (b), respectively, provide that for the purposes of the Act a fur product shall be considered to be falsely or deceptively advertised or invoiced if the advertising or invoices do not show substantially the same information. Section 8 of the Fur Act, among other things, authorizes and directs the Federal Trade Commission to prevent violations of Section 3 by the same means, and with the same jurisdiction, powers and duties as though all applicable terms and provisions of the Federal Trade Commission Act were made a part of the Fur Act.

As will hereinafter appear, the record discloses that respondent misbranded, falsely invoiced, and falsely advertised fur products sold by it. The record further discloses that respondent advertised and offered for sale in commerce fur products through the recognizedly interstate media of The Chicago Tribune, The Chicago American and The Chicago Sun-Times, newspapers with substantial

circulation outside the State of Illinois. Furthermore, the record shows a number of instances where respondent shipped and delivered, or introduced into commerce, fur products sold to customers outside the State of Illinois. In [fol. 179] this latter connection, the hearing examiner found, in effect, that respondent's officials admitted such interstate sales because customer invoices showed that no Illinois sales tax was charged. Thus, the factual evidentiary situation in this regard is substantially the same as that which obtained in *Jaques De Gorter and Suze C. De Gorter, trading as Pelta Furs* v. *F.T.C.* (C. A. 9, decided April 17, 1957), and we conclude that the principles enunciated there are controlling here and that respondent's contentions as to the jurisdiction of the Commission are without merit.

Considering now respondent's second principal contention, namely, that Rule 44 of the Fur Regulations prohibiting price misrepresentations with respect to fur products is an unwarranted extension of power delegated to the Commission pursuant to the Fur Act, it is the opinion of the Commission that this point should be, and it hereby is, decided adversely to respondent—also for the reasons stated in the *Pelta Furs* case, *supra* where the Court, upholding, in effect, the Commission's opinion that Rule 44 is a valid, substantive regulation with the full force and effect of the statute itself, held:

> "By applying the principles in the cases just cited, and taking into account the legislative history of the Act, it is quite evident that the intention was to reach *all misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion [Emphasis by the Court.]

Finally, as indicated above, respondent attacks the sufficiency of the evidence to support findings in the initial decision as to misbranding, false invoicing and deceptive advertising.

Respondent does not dispute that it has violated the [fol. 180] *labeling* requirements of the Fur Act and the rules

and regulations promulgated thereunder.[1] It contends, however, that the instances of violation were merely technical and too trivial in nature to warrant a cease and desist order in the public interest. On this subject, the hearing examiner found as follows:

> "Respondent's argument is without merit. Admittedly, the misbranding found was not as serious or substantial a violation of the Fur Act as, for instance, calling muskrat mink or rabbit ermine, but the very purpose of Congress in adopting the provisions of the Fur Act and directing the Commission to promulgate rules and regulations thereunder was to prevent deception of the public by such practices. It cannot seriously be urged that violations of specific sections of an act adopted by Congress are too technical or trivial to warrant the issuance of a cease and desist order.
>
> "In addition, the Commission, as an expert body, was authorized and directed to adopt rules and regulations to carry out the purpose of the Act, namely, to prevent the deception of the public by misbranding or falsely advertising or invoicing fur products. Obviously, the use of abbreviations, handwriting, and the mingling of non-required information with required information are devices which can readily be used to deceive and mislead the public. Even though [fol. 181] it be conceded that they may have been done innocently, in ignorance of the law, and without intention to deceive, they cannot be permitted. To

[1] In fact, respondent lists in its brief on appeal some seven pages of more than one hundred instances of admitted misbranding. These encompassed failure to use proper names of constituent furs, failure to properly show country of origin and that fur was dyed or artificially colored, improper use of abbreviations, the mingling of non-required with required information and labeling containing information in handwriting. Some of these are in direct contravention of the statute; others are in violation of rules and regulations promulgated under the Act, which are by statute also misbranding. (See *Peita Furs v. F.T.C.*, *supra*.)

dismiss respondent's misbranding as too trivial or technical to warrant the issuance of a cease and desist order would be to open the door to deception and evasion of the Act."

The statute does not establish or specify any criteria to permit differentiation between the trivial or serious nature of instances where a retailer fails to affix a label to fur products disclosing, in the manner and form contemplated, all of the information required by the Fur Act and rules and regulations promulgated thereunder. When alleged practices of a retailer are found to constitute violations of the statute, the Commission is under an obligation to correct them. In the circumstances of record in this proceeding, the Commission has concluded that the hearing examiner's finding in the respect indicated is entirely proper and correct. The reasons urged by respondent against sustaining such finding are without merit.

On the question of *false invoicing*, the hearing examiner found four instances of failure to state the correct name of the animal producing the fur contained in respondent's fur products and six instances of failure to set forth on invoices to customers that a fur product was bleached, dyed or otherwise artificially colored. He also found that respondent's invoices, while setting forth its trade name, do not include its address, as required by Section 5(b)(1) of the Act.

Respondent contends that these findings as to false invoicing should not be sustained. It does not seriously question that its sales slips are deficient in that they fail to show the name of the animal producing the fur, or that such slips do not carry respondent's address. It does question the sufficiency of the evidence to establish the fact that the fur products to which the sales slips related were actually dyed, bleached or artificially colored.

Considering this latter point first, sales slips in evidence show sales of fur products made of muskrat and black [fol. 182] Persian lamb unaccomanied by a statement that they are dyed. There is uncontroverted testimony that furs made of the skins of muskrat and black Persian lamb are always dyed. Respondent's argument that this finding as to false invoicing, with respect to bleached, dyed,

or artificially colored fur, should be stricken is without merit.

On the question of failure to show respondent's address on sale slips, it is the position of respondent that the omission is of such trivial character as not to require corrective action by the Commission. Counsel supporting the complaint point to the express provision of Section 5(b)(1)(E) of the Fur Act which requires invoices to show:

> "(E) the name and *address* of the person issuing such invoice. . ." [Emphasis supplied.]

In the face of this statutory directive, the hearing examiner could not find otherwise than he did in this connection. In Section 2(f) of the Act, the term "invoice" is defined to mean:

> "* * * a written account, memorandum, list or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs."

Respondent's main contention in justification of its false and deceptive invoicing practices is that the requirements of the Fur Products Labeling Act respecting invoicing are inapplicable to transactions involving the retail sale of fur products. Holding in effect that the construction advocated by the respondent misconstrues the impact of the word "other" in the context above, the hearing examiner rejected respondent's argument, and correctly so. The Commission has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer. That a prime purpose of the Act was to eliminate [fol. 183] deceptive invoicing at the consumer level is evident from its title, namely, "To protect consumers and others * * * against * * * false invoicing of fur products and furs." To accept the construction advanced by the respondent clearly would defeat the congressional declar-

ation of purpose and render the Act ineffective in a major respect.

In the latter connection, it should be noted that the retailer's memorandum of sale or invoice constitutes documentary evidence of rightful possession by the consumer of her fur garment, a factor obviously conducive to preservation of the invoice. This consideration is not applicable, however, with respect to the garment label. Inasmuch as the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor, the application of the invoicing provisions of the Act to transactions between retailers and consumers represents a key implement for effective administration of the Act.

Not only is the interpretation advocated by the respondent in conflict with the Act's avowed purpose and the legislative design underlying the invoicing provision, but such a construction ignores the language arrangement of Section 2(f) itself. The words "or agent" prefacing the phrase "or any other person who is engaged in dealing commercially in fur products" are set off from the preceding and succeeding parts of the sentence by commas. Hence, the words "or agent" comprise a separate and integral phrase in their own right. It accordingly seems reasonable to conclude that the final phrase extending the definition of invoice to memoranda issued to commercial dealers generally was intended to augment and expand the kindred class of persons dealt with in the preceding phrase, namely, agents.

Another consideration detracting from the force of the respondent's argument is the fact that sub-section (b) of Section 3 of the Act not only proscribes misbranding and false advertising but false invoicing as well. Subsection (a) similarly forbids misbranding and false and deceptive advertising and invoicing, but its proscriptions relate only to interstate aspects of the marketing and distribution of fur products and furs. Subsection (b) confers jurisdiction over fur products made in whole or in part of fur which has been [fol. 184] shipped and received in commerce, and clearly reaches deception engaged in at the local or intra-state level, the prime point of retail sales' consummation. The inclusion in this subsection of the provision against false invoicing is similarly suggestive of a legislative purpose

that the Act's invoicing requirements be applicable to retail transactions.

Respondent further submits that "it would be an unworkable burden on the retailer at a time of an extensive sale with many inexperienced sales persons on the floor to require each of them to have the detailed and intimate knowledge of the Fur Act * * *" necessary to enter the information required by Section 5(b) of the Act on the invoice, or sales slip, delivered to each customer. The answer to this contention is that such sales person is not required to have any specialized knowledge properly to complete the sales slip. The information can be copied by the sales person directly from the required label attached to the fur product. It is no more, and in fact is less, burdensome on a retailer than on a wholesaler, whose clerical personnel may have no physical contact with the merchandise or labels on merchandise being shipped to meet invoicing requirements of the Act. Respondent's contention that invoicing requirements of the Fur Act and rules and regulations promulgated thereunder do not apply to retail transactions is rejected.

Finally, respondent contends that the evidence does not support the hearing examiner's finding that its advertising of fur products contained false and fictitious statements. The complaint in this respect charges that respondent (1) misrepresented prices of fur products as having been reduced from regular or usual prices in that the regular or usual prices set forth in advertisements in fact were not the prices at which the merchandise was usually sold by respondent in the recent regular course of business, and (2) misrepresented by means of comparative prices and other statements as to "value" the amount of savings to be effectuated by purchasers.

As to (1)—the fictitious pricing charge—the record shows, and the hearing examiner found, that respondent placed an advertisement in The Chicago Tribune of October [fol. 185] 2, 1954, which stated that fur products offered at a price of $244.00 were "Usually $299.00 to $399.00." The record also discloses that it was respondent's customary and usual practice (never deviated from) to enter on manufacturers' invoices, at the time of receipt of merchandise, the intended regular and usual retail prices which, according to the testimony of respondent's buyers, always were

observed. Manufacturers' invoices introduced into evidence herein, and concerning which the same buyers also testified, showed as usual and regular retail prices, amounts of $244.00 or $288.00, not the prices stated in the advertisement as "Usually $299.00 to $399.00." Mr. Camenisch, a witness called in support of the complaint, identified, and testified as to, respondent's invoices furnished to customers on or about the date of The Herald Tribune advertisement. His testimony was that, through identifying stock item numbers appearing on those customer invoices, he traced the particular merchandise involved through respondent's records back to the manufacturers' invoices previously mentioned. He thus established that certain garments sold during the sale for $244.00 were the same garments advertised. This testimony and evidence clearly establishes the relationship of the sales and advertising in question. The net effect of respondent's use of "fictitious" prices such as the above-quoted "Usually $299.00 to $399.00," in the opinion of the Commission, was to mislead and deceive purchasers as to the amount of savings to be realized if advantage were taken of the sale price of $244.00. The evidence fully substantiates the hearing examiner's finding that respondent did engage in fictitious pricing. Respondent's contention on this point, therefore, is rejected.

As to (2)—the comparative pricing charge—the respondent is alleged to have misrepresented the amount of savings possible to a prospective purchaser by stating in advertisements that fur products featured therein had a stated "market value" or "market price" when such stated value, or price, was not true in fact.

The hearing examiner found that the market value or price stated by the respondent in its advertisements exceeded considerably the actual market value or price of [fol. 186] the fur products offered. This finding is based on his analysis of respondent's invoices of sales made, together with manufacturers' invoices, showing costs to respondent, to which are attached "receiving aprons" on which had been made notations of the retail price of the advertised garments to be $125.00.

Of the above-mentioned manufacturers' invoices, Commission Exhibits 25 through 46, covering the 1954 Subway store sale, show costs of garments to respondent ranging

from $83.00 to $100.00; Commission's Exhibits 55 through 60, covering the 1952 Subway store sale, show costs to respondent ranging from $87.50 to $100.00 per garment. There is expert testimony that maximum mark-up usually would range from 50 to 70% of cost. Using that range of mark-up on respondent's unit costs of record, the hearing examiner reasoned, would result in $170.00 as the highest market value of any of the fur products—not the market value or price placed upon them by respondent in its advertisements as ranging from $195.00 to $499.00 in 1954 and from $165.00 to $599.00 in 1952. Also, the hearing examiner found that, "Based upon the highest cost of the fur products, a mark-up of 400 to 500 per cent would have been necessary to reach the market prices of $499.00 and $599.00 listed in respondent's advertisements." The hearing examiner further found that such a mark-up would be incredible. He found equally incredible respondent's argument that because it purchased in lots and quantities, it was able to secure cost prices 400 to 500 per cent below market value.

This reasoning of the hearing examiner, while cogent, does not establish to the satisfaction of the Commission that the respondent misrepresented, by means of comparative prices and other statements as to "value," the amount of savings to be effectuated by purchasers. In order to make such a finding, it is obviously necessary to first find what the actual market value, or price, of the fur products [fol. 187] involved in this proceeding in fact was. There is no evidentiary basis on the record here to make such a determination. All that this record does show is what respondent's costs were, the usual and customary trade mark-up in the Chicago area and the retail prices at which respondent sold fur products. In view of the lack of evidence establishing actual market value, the Commission cannot accept the reasoning of the initial decision as establishing the conclusion that respondent did, in fact, misrepresent savings to be effectuated by prospective purchasers of fur products advertised and sold by it. It follows that the charge in the complaint to the effect that respondent misrepresented, by means of comparative prices and other statements as to "value" not based on current market values, the amount of savings to be effectuated by purchasers of respondent's fur products has not been sub-

stantiated. The initial decision will be modified accordingly.

Turning now to a consideration of the appeal of counsel supporting the complaint, their appeal is limited to challenging the scope of the initial decision's order to cease and desist. Counsel contend, in such connection, that the hearing examiner erred in failing to require the respondent to comply with all labeling and invoicing requirements, respectively, prescribed in Sections 4(2) and 5(b)(1) of the Act. The allegations of the complaint in Paragraphs 3 and 5 are that certain of the respondent's fur products were misbranded and falsely invoiced in that they were not labeled or invoiced as required by these sections.

Under Section 4(2) of the Fur Products Labeling Act, a fur product is misbranded if it does not have affixed to it a label showing in words and figures which are plainly legible:

> "(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7(c) of this Act; [fol. 188] "(B) that the fur product contains or is composed of used fur, when such is the fact;
>
> "(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;
>
> "(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;
>
> "(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;
>
> "(F) the name of the country of origin of any imported furs used in the fur product."

With slight variation, the information prescribed by Section 5(b)(1) for inclusion on invoices to avoid falsity is the same.

With respect to the charge of misbranding in violation of Section 4(2), the record discloses numerous instances of

the respondent's failure to label its fur products with the correct name of the animal producing the constituent fur. Also, there were about 15 occasions when the respondent neglected to disclose on labels attached to its garments the fact that they were composed of dyed, bleached or otherwise artificially colored furs. In addition, we note numerous cases of failure adequately to disclose on labels the required information as to the country of origin of the component furs of the respondent's garments. The evidence shows, however, that the respondent's labels did carry in large type print the words "Mandel Brothers, Chicago," and this we regard to be in substantial compliance with the subsection's requirement for identification of the seller.

[fol. 189] The initial decision's findings generally reflect the foregoing, and similarly recognize that no instances were shown in which the respondent's labels were legally deficient through failure to reveal matters concerning the presence of used fur or paws and tails or relating to the seller's identity. A generally similar situation prevails as to some of the items of information on invoices. The order contained in the initial decision is limited to requiring cessation of the labeling and invoicing deficiencies found, and omits any provision making it mandatory for the respondent to likewise observe the other affirmative requirements of either Section 4(2) or 5(b)(1).

The Fur Products Labeling Act expresses a national policy against misbranding and false invoicing of fur products. Under the Act, a fur product is misbranded and the introduction, or manufacture of it for introduction, into commerce, or the transportation, or distribution of it in commerce, or the sale, advertising, or offering of it for sale in commerce is unlawful, unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4(2), and is falsely invoiced unless there is issued, in connection with its sale, an invoice which incorporates each of the statements of the nature contemplated by Section 5(b)(1). The violations with which the subsections are concerned consist of the failure to attach to a fur garment an adequate label as there prescribed or to deliver to the customer in connection with the sale an invoice that imparts all required information. The subsections do not

deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees. Under the plain language of the statute, the offense of misbranding or false invoicing occurs either by reason of failure to attach to a fur product a label or to issue in connection with its sale an invoice, or failure to include on a label which is attached or to show on an invoice which is issued each of the items of information which the statute requires.

Further supporting this interpretation is the circumstance that the particular definitive provisions relating to misbranding and false invoicing appearing in the sub-
[fol. 190] sections mentioned comprise only part of the definitions contained in Section 4 and Section 5(b). Two additional definitions of misbranding appear in other subsections of Section 4, one (subsection 1) relating to deceptive representations on labels, and the other (subsection 3) specifically prohibiting use on labels of animal names other than those provided in the Fur Products Name Guide. Substantially similar supplemental definitions relating to false invoicing appear in subsection (2) of Section 5(b). Subsection (2) of Section 4 and subsection (1) of Section 5(b) evidence a clear legislative design that garments subject to the Act be at all times identified by labels and invoices revealing facts generally relevant to the utility and value of the component fur and continuously identified with a person likewise subject to the Act. Congress' inclusion of these subsections looked not only to combatting deception by insuring disclosure of material facts, but the subsections were also intended to serve as keystones for effective enforcement of companion sections of the Act likewise directed against misbranding and false invoicing and others proscribing false advertising. The requirements specified for an adequate label in subsection (2) of Section 4 are closely interrelated, and the same holds true for those contained in subsection (b)(1) of Section 5 respecting invoices.

For the foregoing reasons, the Commission is of the opinion that in any case in which it is found that the labeling or invoicing requirements of Sections 4(2) or 5(b)(1) of the statute have not been fully complied with, the appropriate conclusion is that the fur products in connection

with which the deficiencies have occurred have been misbranded or falsely invoiced, and that the appropriate order to be issued in correction of the offence is one requiring cessation of the practice, namely, the misbranding or false invoicing by failure to attach proper labels or to issue proper invoices.

While the foregoing considerations are fully controlling on the scope of the order, it should be noted, too, that the Commission is not limited to prohibiting an illegal practice in the precise form in which it is found to have existed in the past. *Hershey Chocolate Corporation* v. *F.T.C.*, [fol. 191] 121 F.2d 968 (C.A. 3, 1941). In addition to proscribing specific deceptive acts, unfair methods reflecting expansion or variation in original basic theme also may be prohibited. *Consumers Sales Corporation* v. *F.T.C.*, 198 F.2d 404 (C.A. 2, 1952).

Considerations of sound administrative policy similarly require that orders be not unduly narrow in their scope when issued in proceedings wherein proof of misbranding or false invoicing has been limited to failure to comply with some, rather than all, of the requirements of subsections 4(2) or 5(b)(1). If compliance with all criteria of the relevant subsection were not required, institution of new proceedings manifestly would be necessitated in challenging subsequent omission not theretofore resorted to but similarly violative of the public policy expressed in the subsection. The multiplicity of actions so resulting patently would not be in the public interest.

The Commission's long established policy with respect to orders covering violations of Section 4(2) of the Wool Products Labeling Act obviates such multiplicity in the enforcement of that statute. Orders thereunder have included prohibitions against failure to disclose on labels all elements of information required by that subsection, even though failure to disclose some elements of information were not involved in various of the cases; and our orders heretofore issued under the Fur Products Labeling Act generally have contained requirements for a disclosure on labels and invoices of all information prescribed by Sections 4(2) and 5(b)(1) of that Act. An example of such an order was that approved by the Court in the *Pelta Furs* case, *supra*.

By issuing an order of the scope indicated, the Commis-
on is not finding directly, or by implication, that respond-
t has engaged in any questionable practices other than
ose of misrepresenting that its advertised prices were
duced from regular and usual prices; and by failing to
bel and invoice its fur products so as to show its name
d address, the name of the animal producing the con-
tuent fur, the fact that certain of its fur products con-
ol. 192] tained bleached, dyed, or otherwise artificially
lored fur, and, in some instances, the country of origin
imported component furs.

These conclusions notwithstanding, it would be erroneous
conclude that the record affords adequate basis for in-
rmed determinations that the respondent's labeling has
ver in any instance reflected departures from the re-
irements of subparagraphs (b), (d) or (e) of Section
2); and neither does the record suffice for similarly in-
rmed determinations respecting certain of the invoicing
quirements prescribed under the subparagraphs of Sec-
n 5(b)(1). Insofar as the fifth numbered conclusion of
w in the initial decision may imply the contrary, modi-
ation of the initial decision in that respect, in addition
modification of the order contained therein, is warranted.

To the extent previously indicated herein, the appeal of
unsel supporting the complaint is deemed well taken,
d our order providing for appropriate modification of
e initial decision is issuing herewith.

Commissioner Tait concurs in the result.

July 5, 1957.

[fol. 193] BEFORE THE FEDERAL TRADE COMMISSION

Excerpts from Transcript of Testimony

ROBERT L. CAMENISCH was thereupon called as a witness for the Commission and, having been first duly sworn, [fol. 194] testified as follows:

Direct examination.

By Mr. Somers:

Q. Will you state your name and address.

A. Robert L. Camenisch; 453 Oak Street, Elmhurst, Illinois.

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

Hearing Examiner Piper: On the record.

By Mr. Somers:

Q. Who do you work for, Mr. Camenisch?

A. The Federal Trade Commission.

Q. How long have you worked for the Federal Trade Commission?

A. About 4½ years.

Q. What division of the Federal Trade Commission do you work for?

A. The Division of Wool, Fur and Flammable Fabrics Division.

Q. How long have you worked in that particular division?

A. A little in excess of 4 years.

Q. What are your duties with the Wool, Fur and Inflammable Fabrics Division?

A. To make investigations under the Wool Products Labeling Act, the Fur Products Labeling Act, and the Flammable Fabrics Act.

Q. How long have you done that type of work for the Commission?

[fol. 195] A. For 4 years.

Q. Were you at any time directed by the head of your division to investigate whether or not Mandel Brothers, the Respondent herein, was complying with the Fur Products Labeling Act?

A. I was.

Q. When was this?

A. This was in 1952 originally, probably in September of 1952.

Q. And did you make a subsequent investigation at the direction of your supervisors?

A. I did.

Q. When was that?

A. That was in 1954; in October, 1954.

Q. And you made this investigation according to the direction of your superiors?

A. I did.

Q. What stores of Mandel Brothers did you investigate?

A. Their State street store in the Loop, the Subway Fur department, and the Fur Salon.

Q. Was that in both the years 1952 and 1954?

A. That is right.

Q. And during those investigations did you make an inspection of the fur products then in the store,—in the Fur Salon and in the Subway store?

A. I did.

[fol. 196] Q. Did you make an investigation of whether or not the labeling thereon complied with the Fur Products Labeling Act and the Rules and Regulations of the Act?

A. I did.

Mr. Somers: I would like to have marked a label entitled: Mandel Brothers, Chicago, as Commission's Exhibit 1.

(The paper referred to was marked Commission's Exhibit 1 for identification.)

Mr. Somers: And as Commission's Exhibit 2, a stock label of Mandel Brothers of Chicago.

(The paper referred to was marked Commission's Exhibit 2 for identification.)

By Mr. Somers:

Q. I will hand you Commission's Exhibit 1 and ask you if you know what that is.

A. This is a specimen of the type of fur content label which was being used by Mandel Brothers on some of its fur products in both departments, in both 1952 and in 1954.

Q. Did you get that during your investigation?

A. This particular specimen I received during the course of the investigation.

Q. Who gave that to you?

A. Mr. Bernstein who is the buyer in the Subway Fur Department, or was; I don't know what he is now.

Q. I hand you Commission's Exhibit 2 and ask you what that is.

[fol. 197] A. This is a Mandel Brothers stock control tag which appears on all the fur products on hand in both departments.

Q. And did you get that during the investigation?

A. I did. I received this also from Mr. Bernstein.

Q. During this investigation of fur products did you examine the labels in both the Fur Salon and the Subway Store?

A. I did.

Q. And were fur products then hanging in both places?

A. Yes.

Q. Did you find any instances of where the labels did not comply with the Fur Products Labeling Act and the rules and regulations promulgated therein?

A. I did.

Q. Will you tell us in what instance they did not comply with it?

A. I will have to refer to notes that I made at the time.

Mr. Blood: I suggest that instead of putting it in the form of did not comply, that the witness should state for the record what he saw; describe what he saw, what they didn't contain.

By Mr. Somers:

Q. Will you state for the record what they didn't contain?

A. First of all, these which I will now attempt to list will be instances in which the animal named as found in the Fur Products Name Guide does not appear on the fur content [fol. 198] label or does not appear in the manner that is specified in the Fur Products Name Guide.

One instance of a Persian lamb jacket with a fur seal trim in which the trim was stated simply as "black seal".

Two instances of Persian lamb paw garments in which the label read: "Dyed black Persian paw".

Do you want me to go on through all of them?

Q. Yes.

A. One instance of a Broadtail Persian lamb coat with a fur seal trim on which the trim was described as "Alaska seal trim."

A fox scarf, I don't know what species of fox, but a fox scarf which was described as "Dyed fox."

One mink scarf which did not contain the name mink at all. It said "Stuart hybrid". Those were in the Subway Fur Department, in 1952.

In the Fur Salon in 1952——

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

Hearing Examiner Piper: On the record.

A. (continued) A Persian lamb jacket described on the label as "Dyed Persian."

Mr. Blood: This is upstairs?

The Witness: In the Fur Salon.

Mr. Blood: I beg your pardon.

The Witness: Yes, that is right.

[fol. 199] A. (continued) And a Persian lamb paw coat described as "Persian body".

A dyed fur seal coat described as "Alaska seal."

A Persian lamb paw coat described as "Persian paw". That was in 1952. Now, in 1954 in the Subway Fur Department——

Mr. Blood: How many instances in the Fur salon were there?

The Witness: I would have to go through them and count them.

Mr. Somers: The record will show.

Mr. Blood. The record will show; three or four.

A. (continued) In 1954, in the Subway Fur Department there was an instance of, I take it, a hair seal jacket described as "Tropical seal."

A mink cape stole or rather two of them, described simply as "Silver Blue", no animal named.

That takes us through that particular category.

And the instances in which the fur origin was not set out or was not set out in the manner described in the Rules and Regulations:

A Broadtail Process Lamb jacket which did not contain any information as to country of origin.

A dyed Persian lamb coat with no fur origin stated. There are two instances of those.

[fol. 200] Two Persian lamb paw coats which did not have the fur origin stated.

A dyed Peschaniki stole with no fur origin stated.

A black fox scarf without origin stated except in adjective form: "Canadian".

A sable scarf with the fur origin set out in adjective form: "Russian"; rather, there were four of those.

Two Peschaniki coats with no fur origin set out.

There were two Canaquito jackets with no fur origin set out.

There were two rabbit coats without fur origin set out.

A dyed Persian lamb side coat with no fur origin.

A dyed marmot coat with no fur origin stated.

A dyed marmot stole with no fur origin.

Two squirrel jackets with the origin set out in adjective form: "Russian".

Then there were 37 marmot coats with the origin set out as "Outer Mongolia".

Mr. McClure: What should they have set out?

The Witness: My information is that that is a part of China, and that this Outer Mongolia is not a country.

A. (continued) I believe that covers that category.

By Mr. Somers:

Q. Before you go into the next item: Those where they had no fur origins set out; are there any of those furs [fol. 201] raised in the United States?

A. Well, my information is that they are not.

Q. None of the furs which you enumerated are raised in the United States?

A. Not commercially raised for the purpose of the fur commerce.

Q. And in the use of the adjective on the label, it was not

set out underneath the origin of Commission's Exhibit 1, is that what you mean?

A. This tag, Commission's Exhibit 1, in 1952 appeared on, I would say, 25 percent of the garments in their stock, and the other garments were tagged with the vendor's tags,—the manufacturer or whoever they obtained the garments from but on the tag which Mandel Brothers put on their garments the word "Origin" appeared alone as it does on Commission's Exhibit 1.

In 1954 there was a lesser number of those tags, Commission's Exhibit 1, used. There were more garments on hand but the supplier's tags were used.

Q. Where you said they used the word describing as an adjective, the country as an adjective, was that set out under the fur origin or was that set out to describe the fur itself, as part of the fur name?

A. It varied. At some times it was down here with the origin and at other times it appeared with the fur itself as, for example: "Russian Sable."

[fol. 202] Q. Are you going ahead now with your statement?

A. This category has to do with the information as to whether the fur is dyed or artificially colored.

A Persian lamb jacket with fur seal trim; the fur seal trim is described as "Black seal", with no reference to dyeing.

A Persian lamb coat with mink trim, the Persian lamb was not described as dyed; it was described as black Persian lamb.

There was one further instance of this same thing: Persian lamb described as black.

Q. Is Persian lamb naturally black?

A. I don't believe that commercially it is ever used in black in its natural state; it is always dyed.

Q. How about the black seal?

A. The fur seal I understand is always dyed; it can't be used commercially in its natural state.

There were five muskrat coats which were simply described as "muskrat", with no reference to having been dyed.

There were four black Persian lamb sides and heads coats which were not described as dyed.

There were four mole cape jackets described as "Tipped".

Hearing Examiner Piper: What has that to do with dyeing?

The Witness: The actual term is "tipped dyeing".

[fol. 203] By Mr. Somers:

Q. You are acquainted with the Fur Products Law and the rules and regulations thereunder; what should this have been instead of "Tipped"?

A. It should have been "Dyed" or "Tip Dyed."

Q. And what did appear?

A. "Tipped".

That is the extent of that particular category. Abbreviation of the required information on the label I found in the following instances; on a broadtail processed lamb jacket, the word broadtail was abbreviated: "Bdtl".

Q. What are you in now?

A. This is in 1952, in the Subway Fur Department.

Persian lamb coats, 2, with "Southwest Africa", the "Southwest" appreviated: "SW".

Three mink jackets in which the word "Canada" in the fur origin was abbreviated: "Can.".

In 1952, in the Fur Salon, I see no examples of that category.

In the Subway Fur Department in 1954, dyed fitch garments in which fur origin was a*gg*reviated: "F.O."

A dyed muskrat jacket was abbreviated; the word "muskrat" was abbreviated: "Msk st".

A Persian lamb side coat in which the word "Afghanistan" was abbreviated: "Afghan".

[fol. 204] That is the extent of that category.

Now, required information appeared on the face of the label required mixed with required information, we have the following instances——

Mr. Blood: Subway, in 1952?

The Witness: That is right; Subway, in 1952.

A. (continued) On Persian lamb coats with mink trim, two garments contained the words "American Silver Blue mink trim".

Two Persian lamb paw coats contained information "Dyed black Persian paw".

A dyed broadtail Persian lamb coat contained in addition to this required information the word "black".

A black dyed Persian lamb with fur seal trim appeared as "black dyed Persian lamb".

Two dyed rabbit jackets contained in addition to the required information the words "Blue" and "Wintergreen".

A dyed white fox scarf was described on the label as "honey beige dyed white fox".

A dyed red fox boa was described on the label as "red fox died black".

Eleven natural Persian lamb coats contained in addition to the required information the word "gray".

Two mink cape stoles in addition to the required information contained the words "Silver blue".

One dyed Guanaquito jacket was described "blonde [fol. 205] dyed".

In the Fur Salon at that time there were two mink stoles which contained the following information: "Natural tipped wild mink cape stole".

Three instances of squirrel coats described as "gray squirrel".

Three muskrat coats described in addition to the required information as "Silver blue".

Six more natural Persian lamb coats described as "Gray Persian lamb".

Eight Persian lamb side coats, described as "black dyed Persian lamb".

Four dyed muskrat capes described as "Breath of Spring", in addition to the required information.

In 1954 in the Subway Fur Department, three natural Persian lamb coats described as "natural gray Persian lamb".

Two Persian lamb coats with mink trim in which the mink was described by color.

Two squirrel jackets described as "honey colored dyed Russian squirrel".

Two muskrat jackets described as "Hollander forest brown *shde* dyed southern muskrat backs".

By Mr. Somers:

Q. I think those are enough instances of that, Mr. Camenisch.

A. Then the required information was set out in hand-[fol. 206] writing in a number of instances.

On a dyed muskrat jacket——

Mr. Blood: Where are we now?

The Witness: This is back in 1952, in the Subway Fur Department.

A. (continued) On two Persian lamb coats with mink trim; on six Persian lamb coats——

By Mr. Somers:

Q. You are speaking now of handwriting?

A. Of handwriting.

Q. The information set out on the labels was in handwriting?

A. That is right. Two Persian lamb paw coats; a broadtail Persian lamb coat; a Persian lamb coat with fur seal trim; a dyed white fox scarf; a natural blue fox scarf; a black fox scarf; three mink scarv-s; two Japanese mink scarv-s; one Kolinski scarf; one beaver coat; two Guaranquito coats; three raccoon coats.

In the Fur Salon in 1952, I found two raccoon coats; one Persian lamb coat with mink trim; 1 Persian lamb coat; three marmot coats; two muskrat coats; ten rabbit coats.

Q. You are still speaking of the Fur Salon in 1952?

A. No, the last two items have been in the Subway Fur Department.

There were five rabbit coats with mink trim which contained handwriting; nine mouton processed lamb coats; two [fol. 207] natural Persian lamb coats; two dyed otter jackets; two Persian lamb side coats; three dyed marmot stoles; five dyed muskrat capes.

Q. These are all examples of the handwriting?

A. Of the handwriting in 1952, yes.

Q. In the Fur Salon?

A. This is in the Subway Fur Department.

Then there were Persian lamb paw coats, ten. Eleven dyed marmot coats.

In the Subway Fur Department in 1954; two squirrel jackets; two muskrat jackets; seven raccoon flank coats; two Persian lamb side coats; four mole jackets; 1 hair-seal jacket; two squirrel jackets.

In the Fur Salon in 1954: One white fox jacket or scarf; 1 blue fox and one red fox scarf; one natural Persian lamb coat; and that is the extent of the labeling deficiencies as I found them in these inspections.

Q. Did you find any deficiency in regard to the setting out, that the fur product was made out of paws, tails or bellies?

A. I don't find any reference to that in my notes.

Q. Did you find any labels where the name or other identification issued and registered by the Commission was not set out thereon, of a manufactured product?

A. No; on Exhibit 1, the tag that Mandel's set out on fur products, their name, you will see, is printed thereon.

[fol. 208] Q. I will hand you Exhibit 1 and ask you to note the deficiency in that.

A. As it appears on the face of the label?

Q. Yes.

A. Well, as it is set out here, the word "Origin" appears by itself and the term as described in the rules and regulations would be "Fur Origin".

Q. In your investigation is Mandel Brothers the full name of the respondent?

A. The name of the respondent as I recall it and as far as I am informed, is Mandel Brothers, Inc., and in the label it appears simply: Mandel Brothers, Chicago.

Q. Did you find any fur products that were composed of used fur that did not so set out on the label?

A. No, I did not.

Mr. Somers: If your honor please, I would like to have marked as Commission's Exhibit 3, C. P. Fur Co.'s Invoice 703.

(The paper referred to was marked Commission's Exhibit 3 for identification.)

Mr. Somers: I would like to have marked Doumas and Parlitsis Invoice 1094, marked as Commission's Exhibit 4.

(The paper referred to was marked Commission's Exhibit 4 for identification.)

Mr. Somers: These are photostatic copies I would [fol. 209] like to have photostatic copies of Doumas and Parlitsis invoice 1094——

Hearing Examiner Piper: You just had that number.

Mr. Somers: This is a further invoice of the same one.

Hearing Examiner Piper: The same name and number?

Mr. Somers: The same name and number. Evidently they didn't have room enough on the one to put the entire shipment. I would like that marked as Commission's Exhibit 5.

(The paper referred to was marked Commission's Exhibit 5. for identification.)

Mr. Somers: As Exhibit 6 the National Fur Coporation invoice No. 48975.

(The paper referred to was marked Commission's Exhibit 6 for identification.)

Mr. Blood: These invoices are incoming to Mandel Brothers from shippers outside the state?

Mr. Somers: From shippers outside of the state.

Mr. Blood: I think that is in the pleadings.

Mr. Somers: I thought you denied practically all that is in the complaint.

Hearing Examiner Piper: Not that.

Mr. Blood: I was trying to shorten the record.

Hearing Examiner Piper: I think you denied that.

Mr. Somers: Yes, you denied the whole paragraph.

Mr. Blood: I think you are right. I think we said [fol. 210] we didn't know. I will admit it now.

Hearing Examiner Piper: Admit what?

Mr. Blood: We admit that there were furs and fur products received by Mandel Brothers, the respondent, which were shipped to them from outside the state of Illinois if that is what they seek to prove.

Mr. Somers: Shipped and received in commerce, as commerce is defined in the Fair Labor Products Act.

Mr. Blood: I will admit they were shipped from outside the state of Illinois, as a geographical matter.

Mr. Somers: And received by Mandel Brothers.

Mr. Blood: That is right.

Hearing Examiner Piper: I will treat that as a stipulation and will accept the stipulation.

Mr. Somers: Then the reporter can strike off all those exhibits.

Hearing Examiner Piper: You haven't offered them?

Mr. Somers: No.

Hearing Examiner Piper: Nor have you offered Exhibits 1 and 2.

Mr. Somers: No. I thought we would mark them all and offer them all at once, if you have no objection.

Mr. Blood: No; I have no objection.

Hearing Examiner Piper: Off the record.

(Discussion off the record.)

fol. 211] Hearing Examiner Piper: On the record.

Mr. Somers: 3, 4, 5 and 6 are withdrawn.

(The documents marked as Commission's Exhibits 3, 4, and 6 were withdrawn.)

Mr. Somers: If your honor please, I would like to have marked as Commission's Exhibit 3, a facsimile of the sales slip retained by Mandel Brothers after the sale of a fur product.

(The paper referred to was marked Commission's Exhibit 3 for identification.)

Mr. Somers: I would like to have sales slip 33988-4 marked as Exhibit 4.

(The paper referred to was marked Commission's Exhibit 4 for identification.)

Mr. Somers: I would like to have sales slip 33987-7 marked as Exhibit 5.

(The paper referred to was marked Commission's Exhibit 5 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33985-1 marked Commission's Exhibit 6.

(The paper referred to was marked Commission's Exhibit 6 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33975-21 marked as Commission's Exhibit 7.

(The paper referred to was marked Commission's Exhibit 7 for identification.)

[fol. 212] Mr. Somers: I would like to have the facsimile of sales slip 33990-16 marked as Commission's Exhibit 8.

(The paper referred to was marked Commission's Exhibit 8 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33979-2 marked as Commission's Exhibit 9.

(The paper referred to was marked Commission's Exhibit 9 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33988-17 marked as Commission's Exhibit 10.

(The paper referred to was marked Commission's Exhibit 10 for identification.)

Mr. Somers: I would like the facsimile of sales slip 33973-16 marked as Commission's Exhibit 11.

(The paper referred to was marked Commission's Exhibit 11 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33986-7 marked as Commission's Exhibit 12.

(The paper referred to was marked Commission's Exhibit 12 for identification.)

Mr. Somers: I would like to have the facsimile of 33988-28 marked as Commission's Exhibit 13.

(The paper referred to was marked Commission's Exhibit 13 for identification.)

Mr. Somers: I would like the facsimile of sales slip——

[fol. 213] (The paper referred to was marked Commission's Exhibit 14 for identification.)

Mr. Somers: I would like the facsimile of sales slip 33985-20 marked for identification as Commission's Exhibit 15.

(The paper referred to was marked Commission's Exhibit 15 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 32174-8 marked as Commission's Exhibit 16.

(The paper referred to was marked Commission's Exhibit 16 for identification.)

Mr. Somers: And the facsimile of sales slip 33990-27 marked as Commission's Exhibit 17.

(The paper referred to was marked Commission's Exhibit 17 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33981-1 marked as Commission's Exhibit 18.

(The paper referred to was marked Commission's Exhibit 18 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33973-11 marked as Commission's Exhibit 19.

(The paper referred to was marked Commission's Exhibit 19 for identification.)

Mr. Somers: I would like to have the facsimile of sales slip 33986-17 marked as Commission's Exhibit 20.

(The paper referred to was marked Commission's Exhibit 20 for identification.)

[fol. 214] Mr. Somers: And the facsimile of sales slip 16246-18 to be marked as Commission's Exhibit 21.

(The paper referred to was marked Commission's Exhibit 21 for identification.)

Mr. Somers: And the facsimile of sales slip 16244-12 marked as Commission's Exhibit 22.

(The paper referred to was marked Commission's Exhibit 22 for identification.)

By Mr. Somers:

Q. I will hand you Commission's Exhibit 3 and ask you what that is.

A. This is a facsimile which I prepared to indicate the form of the sales invoice which is given to the customer by Mandel Brothers in the sale of fur products.

Q. And that was copied by you from one of their original forms?

A. That is right. This was copied from the book of sales slips which was currently being used at that time in the department.

Q. Where did you get that book?

A. Mr. Bernstein supplied it to me,—the buyer in the Subway Fur Department.

Q. I will now hand you Commission's Exhibit 4 through and including Commission's Exhibit 22 and ask you what those are?

A. These are facsimiles of tissues, that is, the tissue copy [fol. 215] of sales slips recording the sale of fur products in the fur departments which are kept on file in the fur departments.

These facsimiles were prepared by me from notes which I made from the tissues on file, actually on file under the departments.

Q. Why didn't you take photostatic copies of those?

A. I requested photostatic copies of the tissues from, I believe it is the comptroller of this store and Mr. Krackenberger I think is his name, and he said he didn't believe they would photostat,—that the tissues were too faint to give an image, so he suggested that I copy the material from the tissues.

Q. Do those facsimiles contain all the information that was on the sales slips which they represent?

A. Yes, they do.

Q. In the same manner and in the same form?

A. They do.

Q. Except it is your handwriting instead of the sales person's handwriting?

A. That is right.

Mr. Somers: I will offer them.

Hearing Examiner Piper: They were in handwriting, the original sales slips?

The Witness: Yes.

Hearing Examiner Piper: Made out by the sales people?

The Witness: Yes; made out by the sales people at the time of the sale, made out in handwriting.

[fol. 216] Mr. Somers: I will offer Commission's Exhibits 1 through 22 into evidence.

Hearing Examiner Piper: Have you any objection?

Mr. Blood: Yes, I have. He lumped with his offer, 1 and 2, which were the other exhibits previously identified, those two little labels.

Hearing Examiner Piper: Let us treat those separately.

Mr. Blood: I haven't any objection as to the form of these exhibits, the fact that they are facsimiles.

Hearing Examiner Piper: Let us dispose of 1 and 2, first; they are not facsimiles, are they?

Mr. Blood: No.

Hearing Examiner Piper: Do you have any objection to 1 and 2?

Mr. Blood: Only that under the pleadings, under the Complaint filed here, that, the subject matter that he has been examining this witness upon was not specified in any way.

I know you are going to meet that, as I understand it by your note having to go ahead, but we were not put on notice about these alleged violations of the regulations.

Hearing Examiner Piper: Objection overruled. As to Exhibits 1 and 2, they are received.

(The papers referred to, heretofore marked for identification Commission's Exhibits 1 and 2, were received in evidence.)

[fol. 217] Hearing Examiner Piper: Do you have a different objection to the others?

Mr. Blood: No; the same objection. I was trying to make clear to him that I am not objecting on any technical grounds.

Hearing Examiner Piper: Same ruling; Commission's Exhibits 3 through 22 are received in evidence.

(The papers referred to, heretofore marked for identification Commission's Exhibits 3 through 22, both inclusive, were received in evidence.)

[fol. 218] Q. I think that you testified about these sales slips, that they were on thin tissue and that it was not practicable to have them photostated and therefore you made facsimiles; is that true of all of them? I wasn't clear about that. Some of them don't look like facsimiles. I am trying to make that clear in my own mind.

A. In 1952 Mr. Krackenberger was of the opinion that [fol. 219] these tissues would not photostat and he suggested

I make these facsimiles, that he would not attempt to photostat these tissues. In 1954 they agreed to photostat them and they did produce them.

Q. So the ones that were the 1952 sales slips have been reproduced by you in your own handwriting?

A. Yes, in my own handwriting.

Q. And in 1954 the sales slips were photostated?

A. Yes.

[fol. 220] BERNARD B. BERNSTEIN was thereupon called as a witness for the Respondent, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Blood:

Q. Please state your name.

A. Bernard B. Bernstein.

Q. Where do you live?

A. 3017 Leland Avenue, Chicago 25, Illinois.

Q. Where is your present occupation?

A. Fur buyer at Mandel Brothers, Basement Furs.

[fol. 221] Q. When garments come in from manufacturers, do they sometimes already have a label on with this required information?

A. They do.

Q. Do you check that?

A. I check that and if they haven't got it we put our own ticket on which has the required information.

Q. I show you Respondent's Exhibit 1.

(The paper referred to was marked Respondent's Exhibit No. 1, for identification.)

A. Yes.

By Mr. Blood:

Q. I ask you to state what that is.

A. This is the ticket that is required by the Labeling Act showing that this particular garment was a mink and the fur origin is U.S.A., and of course, the register number, 2511.

Q. And the item number?

A. The item number is 1080. This was bought in a lot
so.

Q. Was this particular label taken from a garment
tually available for sale?

A. On the floor; that is right, yes.

Q. As I understood your testimony, if for any reason
ou feel that the information that the manufacturer has
laced there is not correct or is inadequate, that you
rrect it?

A. We put a new ticket on it, yes.

ol. 222] Mr. Blood: I will offer Respondent's Exhibit 1.

Mr. Somers: I would like to know the relevancy of it.

Mr. Blood: The relevancy of it is what we are actually
oing, and what we are trying to do.

Mr. Somers: That is what you are doing as of now.
ou are not holding that this is the same label that was
sed in 1954 or 1952?

Mr. Blood: I will get to that in just a minute. I am
aying this is an example of what he does; this is a label
at came in from the manufacturer, one that is currently
sed and he has told what he does with respect to checking
e accuracy of these labels and if he finds them deficient
any way, he makes the correction before the garment
offered for sale.

Hearing Examiner Piper: Is that the way it came from
e manufacturer?

Mr. Blood: Yes; on most of them, if they are adequate,
ey don't put a label on; they just use the label that
me from the manufacturer.

The Witness: That is the information that is required.

Hearing Examiner Piper: Well, I understand Mr. Som-
s' objection is on the ground of relevancy. This doesn't
nd to prove anything one way or the other, so far as the
omplaint is concerned.

Mr. Blood: All right, if you are going to get that
ol. 223] technical.

Mr. Somers: No, I am not getting technical.

By Mr. Blood:

Q. Did you have labels of this character in 1954?

A. In 1954 we did.

Q. In 1952, which was one month after the Act was en-
cted, you didn't have those?

I make these facsimiles, that he would not attempt to photostat these tissues. In 1954 they agreed to photostat them and they did produce them.

Q. So the ones that were the 1952 sales slips have been reproduced by you in your own handwriting?

A. Yes, in my own handwriting.

Q. And in 1954 the sales slips were photostated?

A. Yes.

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By Mr. Blood:

Q. Please state your name.

A. Bernard B. Bernstein.

Q. Where do you live?

A. 3017 Leland Avenue, Chicago 25, Illinois.

Q. Where is your present occupation?

A. Fur buyer at Mandel Brothers, Basement Furs.

[fol. 221] Q. When garments come in from manufacturers, do they sometimes already have a label on with this required information?

A. They do.

Q. Do you check that?

A. I check that and if they haven't got it we put our own ticket on which has the required information.

Q. I show you Respondent's Exhibit 1.

(The paper referred to was marked Respondent's Exhibit No. 1, for identification.)

A. Yes.

By Mr. Blood:

Q. I ask you to state what that is.

A. This is the ticket that is required by the Labeling Act showing that this particular garment was a mink and the fur origin is U.S.A., and of course, the register number, 2511.

Q. And the item number?

A. The item number is 1080. This was bought in a lot also.

Q. Was this particular label taken from a garment actually available for sale?

A. On the floor; that is right, yes.

Q. As I understood your testimony, if for any reason you feel that the information that the manufacturer has placed there is not correct or is inadequate, that you correct it?

A. We put a new ticket on it, yes.

[fol. 222] Mr. Blood: I will offer Respondent's Exhibit 1.

Mr. Somers: I would like to know the relevancy of it.

Mr. Blood: The relevancy of it is what we are actually doing, and what we are trying to do.

Mr. Somers: That is what you are doing as of now. You are not holding that this is the same label that was used in 1954 or 1952?

Mr. Blood: I will get to that in just a minute. I am saying this is an example of what he does; this is a label that came in from the manufacturer, one that is currently used and he has told what he does with respect to checking the accuracy of these labels and if he finds them deficient in any way, he makes the correction before the garment is offered for sale.

Hearing Examiner Piper: Is that the way it came from the manufacturer?

Mr. Blood: Yes; on most of them, if they are adequate, they don't put a label on; they just use the label that came from the manufacturer.

The Witness: That is the information that is required.

Hearing Examiner Piper: Well, I understand Mr. Somers' objection is on the ground of relevancy. This doesn't tend to prove anything one way or the other, so far as the Complaint is concerned.

Mr. Blood: All right, if you are going to get that [fol. 223] technical.

Mr. Somers: No, I am not getting technical.

By Mr. Blood:

Q. Did you have labels of this character in 1954?

A. In 1954 we did.

Q. In 1952, which was one month after the Act was enacted, you didn't have those?

A. Yes, that is correct. We didn't, then.
Q. And you have them today?
A. 1953 is when we started putting them on.
Q. 1953?
A. Yes.

Mr. Blood: Mr. Examiner, my point on this line of inquiry is this: This was a new statute and a new set of regulations and the time they made the first regulations here was only a few weeks after it had gone into effect. There have been some deficiencies. The testimony is they have been trying to comply. They have been working on it and by the time of 1954 this label was commonly used and we are entitled to introduce it.

Hearing Examiner Piper: I don't remember what was introduced in the last hearing. Were there labels introduced?

Mr. Blood: Yes.

Hearing Examiner Piper: Were there labels introduced which the Commission alleges didn't contain the records [fol. 224] they should?

Mr. Blood: The labels themselves were all right. Mr. Camenisch pointed out certain information on the label which he thought did not comply, in certain instances.

Hearing Examiner Piper: Was that just in 1952 or were there some in 1954?

Mr. Somers: 1952 and 1954.

Hearing Examiner Piper: In both cases there were some labels introduced. That is what I am trying to get at.

Mr. Somers: They used the same label in 1952 and 1954 except in 1954 they didn't have the label item. This is a manufacturer's label and this is Mandel Brothers'.

The Witness: When this is off, we put in one of these tickets in order to have a label.

Hearing Examiner Piper: When you said "one of these tickets" you are referring to Respondent's Exhibit 1 for identification.

Mr. Blood: Yes.

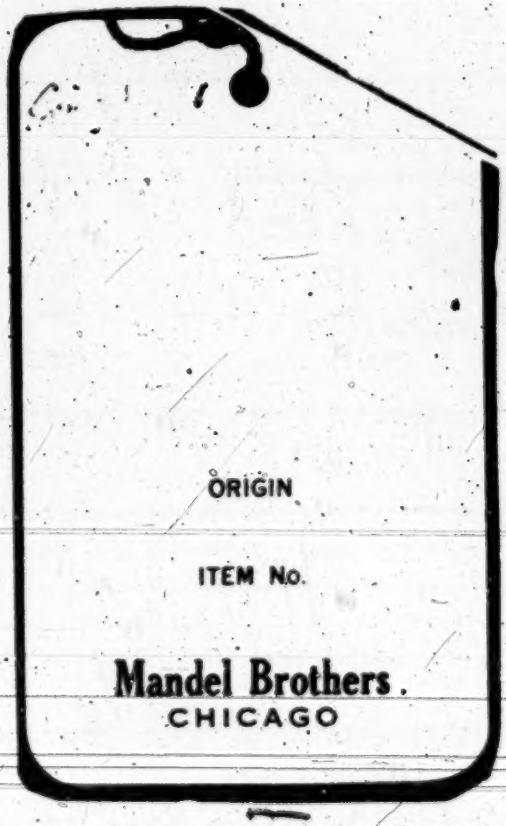
The Witness: Yes.

Hearing Examiner Piper: That is the type of label you attach if it is not one of the labels of the respondent?

The Witness: Yes.

(Here follow 2 photolithographs, side folios 225 and 226)

[fol. 225] COMMISSION'S EXHIBIT No. 1



[fol. 226] COMMISSION'S EXHIBIT No. 3

MANDEL BROTHERS

(NUMBER)

DEPT	CLERK	HOW SOLD	MO.	DAY	Enclosures No. Val.

SEND TO

ADDRESS APT. or HSE.

CITY ZONE STATE Near or care of

Charge to Identification No.

Address City

Quan.	Class		Unit Pr.	Amt
		(NUMBER)		

DEPT	CLERK	HOW SOLD	MO.	DAY	No. Val.

Deposit Cash Tube

(NUMBER)

[fol. 227] COMMISSION'S EXHIBIT No. 4

FEDERAL TRADE COMMISSION

Docket No. 6434

33988-4

14

110 GS 856 Budg 10 6

R. A. Nelson, 418 E. Hillside, Barrington, Ill.

1 Natl Ranch Rump 9/K 2964 Mink Coat		125.00
1 Mink Side Coat 9/K 2909		125.00
		250.00
	FT	50.00
	AC	2.50
		302.50
110 GS—856 Budg 10 6		302.50

[fol. 228] COMMISSION'S EXHIBIT No. 12

FEDERAL TRADE COMMISSION

Docket No. 6434

33986-7

110 110-20 W. C. 10 6

J. Keesee, 241 Dyer Blvd., Hammond, Ind.
Will Call

1	43/8	2857	Stole		125.00
				Fed	25.00
					150.00
				Dep.	15.00
					135.00

Will Call

No. 65668

Will Call

110 110 20 W.C. 10 6 150.00

(Here follow 2 photolithographs, side folios 229 and 230)

[fol. 229] COMMISSION'S EXHIBIT No. 53

CHARGE TO: Mrs C Dittmann — IDENTIFICATION NO.
4224 Arnold
Sylvan Glen

QUAN.	CLASS	ARTICLE	PRICE	AMOUNT
1		Lloyd otten		
		304 Coat	2 44	00
		- 3rd Sat		24 40
		WILL CALL CJ		4 88
		P.O. 4491	2 73	28
		- WILL CALL BC		30 00
		$04396	2 43	28

IF FURNITURE DELIVERY, INDICATE BELOW

ROUTE NO.	DEL. DAY	DEL. DATE	AM'T OF SALE
			36337·33

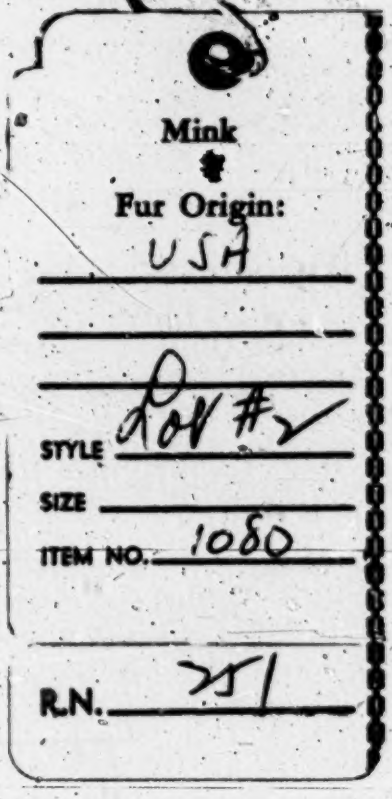
DEPT.	SOLD BY	NO. DAY	HOW SOLD	AMT. OF SALE
10	10·13	10-7	WC	

MANDEL BROTHERS
STate 2-1000

AMT. RECEIVED	DEPOSIT
	44

[fol. 230] RESPONDENT'S EXHIBIT No. 1

[Reverse]



[Face]

[fol. 231] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

SEPTEMBER TERM 1957—January Session 1958

MANDEL BROTHERS, INC., a corporation, Petitioner,

v.

FEDERAL TRADE COMMISSION, Respondent

On Petition to Set Aside an Order of the Federal Trade Commission.

OPINION—April 1, 1958

Before DUFFY, *Chief Judge*, SCHNACKENBERG and PARKINSON, *Circuit Judges*.

PARKINSON, *Circuit Judge*. The petitioner, Mandel Brothers, Inc., is a Delaware corporation. It owns and operates a large department store in Chicago, Illinois with annual sales of approximately $32,000,000. It has two fur departments, one on the fifth floor and the other in the basement.

The petitioner is here seeking to set aside a cease and desist order entered July 5, 1957 under the Fur Products Labeling Act, Title 15 U.S.C.A. § 69 *et seq.* by the respondent Federal Trade Commission. There are five contested issues.

The first is whether the petitioner's activities constitute interstate commerce subject to the jurisdiction of the Federal Trade Commission.

[fol. 232] The parties stipulated that furs and fur products sold by petitioner were shipped to and received by it from outside the the State of Illinois. Petitioner's fur department managers testified that they went to New York City ten or twelve times a year to buy furs for their departments and that most of the furs that are sold in the petitioner's store are bought there. There was also evidence that the petitioner advertised in the *Chicago Tribune*, the *Chicago Sun-Times* and the *Chicago American*, all of

which, as stipulated by the parties, have interstate circulation and that furs were sold to non-residents of Illinois and sent to an out of state address. The witness Hill, manager of petitioner's fifth floor fur department, testified that Commission's Exhibit 12, a sales slip, had no Illinois sales tax thereon and therefore the goods would have to be delivered outside the State of Illinois. Commission's Exhibits 19 and 20 also show similar sales to residents of Indiana upon which no Illinois sales tax had been charged. Accordingly there was ample evidence in the record from which the Commission could find that the petitioner was engaged in interstate commerce. *DeGorter* v. *Federal Trade Commission*, 9 Cir., 1957, 244 F. 2d 270. The case of *Federal Trade Commission* v. *Bunte Brothers*, 1941, 312 U.S. 349, cited by the petitioner is inapposite in that Bunte Brothers' sales were made exclusively in Illinois.

The second issue is whether the Commission's Rule 44 under the Act is a valid exercise of the authority delegated to the Commission.

Section 8 (a) (1) (b) of the Act authorizes the Commission to prescribe, *inter alia*, such rules and regulations as may be necessary and proper for purposes of the administration and enforcement of the Act.

Section 5 (a) (5) provides:

> "For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement * * * which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur * * * contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur; * * *."

[fol. 233] We agree with the Ninth Circuit in *Degorter* when it said, "the intention was to reach all *misrepresentations in advertising*, including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion."

The Commission found that certain fur products sold by the petitioner for $244 were the same ones advertised in the *Chicago Tribune* on October 2, 1954 as "Usually $299 to $399" the net effect of which was to mislead and deceive purchasers as to the amount of savings to be realized. We believe that finding is supported by substantial evidence. Mandel called its manager of the fifth floor fur department as a witness but made no attempt to prove these garments were usually sold at $299 to $399. Petitioner's contention that the issue here is not the regular and usual price of the specific garments sold by Mandel but the regular and usual price of similar or comparable garments fails inasmuch as the customer would make no such distinction. Moreover, there is no evidence in this record that the regular and usual price of similar or comparable garments was $299 to $399.

The third issue is whether the evidence as to labeling, invoicing, advertising and record-keeping is such as to warrant and support the Commission's cease and desist order.

What we have held as to advertising is dispositive of that question. The evidence of Mandel's fur salon manager that Mandel had no definite records showing the garments that had been sold at the advertised price gives adequate support to the order of the Commission as to inadequate record-keeping.

As to the labeling the Hearing Examiner found that Mandel had not violated subdivisions (B), (D) and (E) of §4 (2) of the Act and his cease and desist order did not include these subdivisions. The Commission, on appeal, specifically found that there was no evidence as to violations of these same subdivisions but did include them in its cease and desist order. The Supreme Court in its opinion [fol. 234] in *Federal Trade Commission* v. *Ruberoid Co.*, 1952, 343 U.S. 470, 473 held that, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" and also in *Federal Trade Commission* v. *National Lead Co.*, 1957, 352 U.S. 419, 431 "that those caught violating the Act must expect some fencing in." However, here the Commission specifically found that there was no evidence of any violation of subdivisions (B), (D) and (E) of §4 (2). We find no difficulty in subscribing to the doctrine that a cease

and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do.

The petitioner concedes that it has violated subdivisions (A), (C) and (F) of §4 (2) and Rules 4 and 29 promulgated under §8 (a) (2) (b). It attempts to excuse its violations upon the ground that they are technical and trivial. If such an excuse were valid the enforcement of the Act would be virtually impossible. In this we find no merit.

The Commission contends that when Mandel failed to place certain information upon the sales slip given to the consumer that constituted a violation of §3(b) of the Act. Petitioner argues that a sales slip is not an "invoice" within the meaning of the Act. The word "invoice" has an accepted meaning in the commercial world. It is a written account or itemized statement of merchandise shipped or sent to a purchaser or consignee with the quantity, value or prices and charges set forth. However, the Fur Products Labeling Act defines the term and we must look to that definition for its meaning.

Section 2 (f) of the Act defines "invoice" as:

> "a written account, memorandum, list, or catalog, *which is issued in connection with any commercial dealing* in fur products or furs, and describes the particulars of any fur products or furs transported or delivered to a purchaser, * * * or any *other* person *who is engaged in dealing commercially in fur products or furs.*" (our emphasis)

[fol. 235] This statutory definition is plain and unambiguous and to come within its terms an "invoice" must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially.* Under no circumstances is a sales slip given to a customer by a retailer a written account, memorandum, list, or catalog issued in connection with a commercial dealing. An invoice is not brought down to the retail level by this section.

The respondent attempts to buttress its position with excerpts from hearings before a congressional committee. However, when the language used in a statute is clear and unambiguous its legislative history cannot control the interpretation as "such aids are only admissible to solve doubt and not to create it." *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 1922, 257 U.S. 563, 589. "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms." *United States* v. *Shreveport Grain & Elevator Co.*, 1932, 287 U.S. 77, 83. There is no doubt as to the meaning of "invoice" as defined by the statute. It is clearly not a sales slip at the retailer-customer level.

We agree with the Commission that a limiting clause is to be restrained to the last antecedent unless the subject requires a different construction. If the last antecedent were "any person" instead of "any other person" the word "purchaser" might not be limited to one engaged in dealing commercially in fur products or furs. However, when the statute says purchasers or any *other* person who is so engaged the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs.

The fourth issue is whether the Commission, having found that there was no evidence of certain violations, properly included prohibition of those violations in its cease and desist order. As the order must be modified and those portions deleted therefrom pursuant to our [fol. 236] determination of the third issue consideration of this issue is no longer necessary.

The fifth issue is whether the Commission properly imposed its cease and desist order on Mandel's officers, representatives, agents and employees when only Mandel itself was named in the complaint.

The petitioner is a corporation. A corporation can act only through its agents. This rule of law is so elementary that citation of authorities is certainly not required.

We did hold in *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 7 Cir., 1951, 192 F. 2d 535, 540 that the Commission was without authority to include officers, agents, representatives and employees in its cease and desist order. We did make a distinction in *Anchor Serum Company* v. *Federal Trade Commission*, 7 Cir., 1954, 217 F. 2d 867, 874. We have given careful consideration to the question and have come to the conclusion that we were in error in *Reynolds*. Accordingly so much of our decision therein as pertains to this question is overruled.

We hold that the Commission did have the power to include in its cease and desist order Mandel's officers, representatives, agents and employees.

The cease and desist order here under review is hereby ordered modified by deleting therefrom subdivisions (b), (d) and (e) of subsection 1 of A and all of B.

The order as modified is AFFIRMED.

[fol. 237] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

MANDEL BROTHERS, INC., a corporation, Petitioner,

vs.

FEDERAL TRADE COMMISSION, Respondent

Petition to Set Aside an Order of the Federal Trade Commission

JUDGMENT—April 1, 1958

This cause came to be heard on the petition to review and set aside an order of the Federal Trade Commission, and the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjusted by this Court that the cease and desist order here under review be modified deleting therefrom provisions (b), (d), and (e) of subsection 1 of A and all of B, and the said order as modified is affirmed.

[fol. 238] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ORDER DENYING PETITION FOR REHEARING—May 1, 1958

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, Denied.

[fol. 239] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128

MANDEL BROTHERS, INC., a corporation, Petitioner;

v.

FEDERAL TRADE COMMISSION, Respondent

FINAL DECREE—May 8, 1958

Mandel Brothers, Inc., a corporation, petitioner herein, having filed in this Court on September 10, 1957, its petition to set aside an order to cease and desist issued against it on July 5, 1957, by the Federal Trade Commission, respondent herein, in a proceeding before said respondent entitled In the Matter of Mandel Brothers, Inc., a corporation, Docket No. 6434; and the petition having been heard by this Court on briefs and oral argument; and this Court having thereafter fully considered the matter and rendered its decision on April 1, 1958, whereby it modified the Commission's order by deleting therefrom subdivisions (b), (d), and (e) of subsection 1 of A and all of B thereof, and having affirmed the order as so modified;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that petitioner, Mandel Brothers, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which has been made in whole or in part of fur which

has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of bleached, dyed, or artificially colored fur, when such is the fact;

(c) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels attached to fur products:

(a) Required information in abbreviated form or in handwriting;

(b) Non-required information mingled with required information.

[fol. 240] B. Falsely or deceptively advertising fur products through the use of any advertisement, public announcement, or notice which is intended to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of fur products, and which represents directly or by implication that the regular or usual price of any fur product is any amount which is in excess of the price at which petitioner has usually and customarily sold such products in the recent regular course of its business;

C. Making pricing claims or representations of the type referred to in Paragraph B above, unless there is maintained by petitioner full and adequate records disclosing the facts upon which such claims or representations are based.

And It Is Further Ordered, Adjudged and Decreed that within ninety days after the entry of this Decree petitioner shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with this decree.

Without prejudice to the right of the United States as provided in section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violations of the aforesaid order to cease and desist, as modified and hereby enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance therewith in every respect and to prevent evasion thereof.

By the Court: (S.) F. Ryan Duffy, Chief Judge. Elmer J. Schnackenberg, W. Lynn Parkinson, United States Circuit Judges.

Entered: May 8, 1958.

[fol. 241] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX

To Petitioner's Brief

Statement Pursuant to Rule 16(b) of the Rules of the United States Court of Appeals for the Seventh Circuit

The proceeding below was initiated by the action of the Federal Trade Commission in issuing its complaint against Mandel Brothers, Inc., a corporation, respondent. That proceeding was styled and captioned "In the Matter of Mandel Brothers, Inc., a corporation. Docket No. 6434." The complaint was issued on October 27, 1955, and was served on November 4, 1955. Further pertinent proceedings were as follows:

[fol. 242] Dec. 27, 1955. Motion by respondent to strike complaint or, in the alternative, for a more definite statement.

Jan. 3, 1956. Answer by counsel supporting complaint, to above motion.

Jan. 4, 1956. Hearing Examiner's order denying above motion.

Jan. 11, 1956. Answer filed by respondent.

Apr. 12, 1956. Initial hearing.

June 7, 1956. Further and final hearing.

Oct 9, 1956. Hearing Examiner's initial decision and order to cease and desist, served Oct. 18, 1956.

Oct. 23, 1956. Notice of appeal to the Commission from Hearing Examiner's initial decision, by respondent.

Oct. 24, 1956. Notice of appeal to the Commission from Hearing Examiner's initial decision, by counsel supporting complaint.

Jan. 31, 1957. Argument before the Commission, on appeals.

July 5, 1957. Final order of the Commission, with opinion of the Commission.

July 15, 1957. Final order and opinion of the Commission served.

Sep. 10, 1957. Petition to review filed by Mandel Brothers, Inc.

[fol. 243] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—June 25, 1958

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30th, 1958.

Tom Clark, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of June, 1958.

[fol. 244] Clerk's Certificate to Foregoing Transcript (Omitted in Printing.)

[Title omitted]

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United tes Court of Appeals for the Seventh Circuit is granted, l the case is transferred to the summary calendar.
And it is further ordered that the duly certified copy of transcript of the proceedings below which accompanied petition shall be treated as though filed in response to h writ.

U. S. GOVERNMENT PRINTING OFFICE: 1958

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JUL 30 1958
JOHN T. FEY, Clerk

No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
The invoicing violations	4
The labeling violations	5
Reasons for granting the writ	7
Conclusion	14
Appendices	15

CITATIONS

Cases:	
Black v. *Magnolia Liquor Co.*, 355 U. S. 24	8
De Gorter v. *Federal Trade Commission*, 244 F. 2d 270	10
Federal Trade Commission v. *Morton Salt Company*, 334 U. S. 37	11
Federal Trade Commission v. *Ruberoid Company*, 343 U. S. 470	11
Fenton v. *Thorley & Co.*, [1903] A. C. 443	10
Knowlton v. *Moore*, 178 U. S. 41	10
Local 167, Int'l Brotherhood of Teamsters v. *United States*, 291 U. S. 293	13
May Department Stores Company v. *National Labor Relations Board*, 326 U. S. 376	12
National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426	12
Siegel Company, Jacob v. *Federal Trade Commission*, 327 U. S. 608	11
United States v. *American Trucking Ass'ns*, 310 U. S. 534	10
White v. *United States*, 191 U. S. 545	10

474233—58——1

Statutes:

	Page
Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq*	2, 7, 10, 11, 13, 24
Section 2(f)	3, 7, 24
Section 3	7, 10, 24
Section 3(a)	3, 24
Section 3(b)	3, 25
Section 4	4, 13, 25
Section 4(2)	4, 5, 6, 13, 26
Section 5(a)	26
Section 5(b)	3, 4, 27–28
Wool Products Labeling Act, 15 U. S. C. 68, *et seq.*:	
Section 4(2)	14

Miscellaneous:

Hearing before the House Committee on Interstate and Foreign Commerce on H. R. 3734, 80th Cong., 2d sess	10
S. Rep. No. 78, 82d Cong., 1st sess	9, 10

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above cause on April 1, 1958, which modified the Commission's cease-and-desist order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 15–21) is reported at 254 F. 2d 18.

JURISDICTION

The judgment of the Court of Appeals modifying the Commission's order, and affirming it as modified, was entered on April 1, 1958 (Appendix B, *infra*, p. 22). The court's final decree, enforcing the order as modified, was entered May 8, 1958. The time for

filing a petition for a writ of certiorari was extended by Mr. Justice Clark on June 25, 1958 to July 30, 1958 (Appendix C, *infra*, p. 23). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether sales at the retail level are outside the scope of the provisions of the Fur Products Labeling Act prohibiting false and deceptive invoicing.

2. Whether the Federal Trade Commission, in issuing cease-and-desist orders against failure to label fur products properly, is confined to proscribing the the precise labeling omissions which it found.

STATUTE INVOLVED

The relevant portions of the Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq.*, are set forth in Appendix D, *infra*, pp. 24–28.

STATEMENT

On October 27, 1955 the Federal Trade Commission issued a complaint charging that respondent, which operates a large department store in Chicago, Illinois, had violated the Fur Products Labeling Act (App. 2–8).[1] After full administrative proceedings, the Commission, adopting the examiner's findings (with minor modifications), found that respondent had violated the Act as charged, and entered a cease-and-desist order. The principal violations found were misbranding, false and deceptive invoicing, and false advertising. The Court of Appeals modified the order

[1] "App." refers to the appendix to respondent's brief in the Court of Appeals.

in two important respects, and affirmed and enforced its other provisions. The court eliminated the prohibition against false and deceptive invoicing, on the ground that the Act does not extend to invoices given to retail customers; and it held that the prohibitions against misbranding were too broad.

Section 3 (a) of the Act (15 U. S. C. 69a (a)) makes it unlawful to sell "in commerce * * * any fur product which is misbranded or falsely or deceptively advertised or invoiced * * *"; and Section 3 (b) (15 U. S. C. 69a (b)) makes it unlawful to sell "any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced * * *." Section 5 (b) (15 U. S. C. 69c (b)) provides that a fur product or fur is falsely or deceptively invoiced if the "invoice" does not show (A) the name of the animal that produced the fur; where applicable, (B) that the product contains used fur, (C) contains bleached, dyed, or artificially colored fur, or (D) is composed in whole or substantial part of paws, tails, bellies, or waste fur; (E) the "name and address" of the person issuing such invoice; and (F) the country of origin of any imported furs. Section 2 (f) of the Act (15 U. S. C. 69 (f)) defines "invoice" as "a written account, memorandum * * * which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee * * *,

or any other person who is engaged in dealing commercially in fur products or furs."

Section 4 of the Act (15 U. S. C. 69b) provides that a fur product is misbranded if (1) it is "falsely or deceptively labeled * * * or identified," or (2) there is not affixed a label setting forth six specific categories of information which are substantially identical to those which Section 5 (b) requires to be set forth in the invoice (except that Section 4 (2) (E) requires the label to show the name of the person who manufactures the fur product, rather than the "name and address" of the person issuing the invoice).

The Invoicing Violations

The Commission found that respondent had violated the invoicing provisions of the Act because its invoices did not show its address and, in several instances, failed to set forth the correct name of the animal producing the fur and did not disclose that the fur was bleached, dyed, or otherwise artifically colored. The Commission rejected respondent's contention that the Act is not applicable to retail invoicing. It stated (App. 147) that "a prime purpose of the Act was to eliminate deceptive invoicing at the consumer level"; that it has "consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer"; and that respondent's contention would "render the Act ineffective in a major respect."

The Court of Appeals eliminated the prohibitions relating to invoicing, on the ground that under the

statute a sales slip given to a retail customer is not an "invoice" (Appendix A, *infra*, pp. 19–20). The court ruled that an invoice "must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially*" in furs, and that, "[u]nder no circumstances is a sales slip given to a customer by the retailer * * * issued in connection with a commercial dealing." The court refused to consider the legislative history of the Act, on the ground that when statutory language is "clear and unambiguous its legislative history cannot control the interpretation * * *."

The Labeling Violations

The Commission found the following violations of the Act's labeling requirements: 12 instances of failure to label the product with the correct name of the animal producing the fur (Section 4 (2) (A)), 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored (Section 4 (2) (C)), and 58 instances of failure to show the country of origin of imported furs (Section 4 (2) (F)). The Commission further found 187 violations of its rules which provide additional labeling requirements.[2] The Commission held (App. 158), however, that there was "no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were

[2] In 9 instances, required information was improperly set forth in abbreviated form; in 59 instances, non-required information was mingled with required information; and in 119 instances, required information was set forth in handwriting.

composed of used fur, or were composed of paws, tails, bellies, or waste fur, or that they failed to disclose respondent's name * * *."

Although the examiner recommended that the cease-and-desist order be limited to the three categories of information found to have been omitted, the Commission's order directed respondent to cease and desist from "Misbranding fur products by: * * * Failing to a affix labels to fur products showing" the six categories of information required by Section 4 (2) (App. 159–160). The Commission stated (App. 154) that "[u]nder the Act a fur product is misbranded * * * unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4 (2)"; that the subsections "do not deal with separate violations in and of themselves" (*ibid.*); and that "in any case in which it is found that the labeling * * * requirements * * * have not been fully complied with, the appropriate conclusion is that the fur products in connection with which the deficiencies have occurred have been misbranded * * * and that the appropriate order to be issued in correction of the offense is one requiring cessation of the practice, namely, the misbranding * * * by failure to attach proper labels * * *" (App. 155).[1]

[1] The Commission reached the same conclusion with respect to the scope of the order directed against invoicing violations. It enjoined respondent from failing to furnish invoices containing the six categories of information required by the Act (App. 160), even though it found (App. 158) that there was "no evidence" that certain of those categories had been violated. Since the Court of Appeals held that the part of the

The Court of Appeals struck from the order the prohibitions against the three categories as to which no violations were found (Appendix A, *infra*, pp. 18–19). Although stating it accepted the "doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in," the court refused to "affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do."

REASONS FOR GRANTING THE WRIT

1. In holding that sales slips given by retailers of fur products to the ultimate consumer are not "invoices" subject to the disclosure requirements of the Fur Products Labeling Act, the court below has adopted a construction of the Act—a clearly erroneous construction, we believe—which, unless reversed by this Court, will seriously frustrate a principal purpose of the Act and substantially limit the protection against misbranding afforded by Congress to purchasers of fur products.

Section 3 makes it unlawful (*inter alia*) to sell "any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is * * * falsely or deceptively * * * invoiced * * *." Section 2 (f) of the Act defines "invoice" as "a written account, memorandum, list, or

order dealing with the invoicing violations was beyond the Commission's statutory authority, it did not reach the question of its scope.

catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs." The court below held that under this definition an "'invoice' must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially*"; and that "[a]n invoice is not brought down to the retail level by this section," since a "sales slip given to a customer by a retailer" is not "issued in connection with a commercial dealing" (Appendix A, *infra*, pp. 19–20).

We submit, however, that the statutory definition of "invoice" does cover sales slips at the retail level. Giving the words of the definition their ordinary meaning, the ultimate consumer who purchases and wears a fur product is a "purchaser," and the sale to such a consumer is a "commercial dealing." Furthermore, the phrase at the end of the definition, "who is engaged in dealing commercially in fur products or furs," does not, in our view, modify and limit the word "purchaser." Although the Commission relies primarily on the usual usage of the statutory terms, it should also be noted that "[w]e deal here with remedial legislation whose language should be given hospitable scope." *Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 26.

In any event, we believe that the court plainly erred in holding that the definition of "invoice" is so "clear and unambiguous" as to preclude resort to legislative history. That history evidences Congressional concern with protecting the ultimate consumers of furs against the evils of various false and deceptive practices, and strongly supports the conclusion that the Act's invoicing provisions are applicable at the retail as well as at the manufacturing and wholesale levels.

The Senate Report stated that one of the two purposes of the bill is "[t]o protect *consumers* and scrupulous merchants against deception and unfair competition resulting from the misbranding, false or deceptive advertising, or *false invoicing* of fur products and furs * * *" (S. Rep. No. 78, 82d Cong., 1st sess., p. 1, emphasis added). The report also stated that "fur when offered and sold to the buying public often has had its natural appearance materially changed by processing and dyeing" (*id.*, p. 2); that it "is difficult and generally impossible for the American housewife to know what she is buying unless reliable factual information is disclosed to counteract the impression left with her as a result of the deceptive condition of the particular fur article of wearing apparel" (*ibid.*); and that the prohibitions contained in the Act "will effectively check types of advertising, *invoicing*, and labeling which by implication are calculated to mislead one as to the habitat of the animal, a matter regarded by many consumers as having considerable bearing on the quality and character of

furs" (*id.*, p. 4).[4] The aim of Congress to protect consumers against false invoicing as well as misbranding and false advertising is also shown by the title of the statute (65 Stat. 175): "An Act to protect *consumers* and others against misbranding, false advertising, and false *invoicing* of fur products and furs" (emphasis added.)[5]

In view of this clear Congressional design to protect consumers of furs and fur products, it would be anomalous for Congress to have made the advertising and mislabeling prohibitions applicable to retail transactions—as Section 3 has done (*De Gorter* v. *Federal Trade Commission*, 244 F. 2d 270 (C. A. 9))—and yet to have denied retail customers the same protection against false invoicing. The Commission "has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer" (App. 147).[6] As the Commission

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[4] At the hearings on a predecessor bill (substantially identical with that which became the Fur Products Labeling Act), there was extensive discussion of the need for requiring that invoices at the retail level affirmatively disclose pertinent information. Hearing before the House Committee on Interstate and Foreign Commerce on H. R. 3734, 80th Cong., 2d sess., at pp. 119, 120, 123, and 156–157.

[5] The title of a statute may be considered in resolving ambiguity. *Knowlton* v. *Moore*, 178 U. S. 41, 65; *White* v. *United States*, 191 U. S. 545, 550. See also *Fenton* v. *Thorley & Co.*, [1903] A. C. 443, 447 (H. L.)

[6] This "'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new,'" is "entitled to great weight." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549.

pointed out (*ibid.*), a contrary construction would "defeat the congressional declaration of purpose and render the Act ineffective in a major respect."

The question whether the Act applies to retail invoicing is important in its administration and enforcement. Since the Act became effective in 1952, the Commission has issued more than 100 complaints charging false and deceptive invoicing at the retail level; in addition, there are currently outstanding 94 Commission orders relating to retail invoicing, and more than 35 pending administrative proceedings involving the same activity.

2. The court below also erred in holding that Commission cease-and-desist orders under the Fur Products Labeling Act may prohibit only the particular types of misbranding (and, by the same reasoning, of false invoicing) found to have been committed.

This Court has consistently recognized that the Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" disclosed in its proceedings. *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U. S. 608, 611; *Federal Trade Commission* v. *Ruberoid Company*, 343 U. S. 470; cf. *Federal Trade Commission* v. *Morton Salt Company*, 334 U. S. 37, 51–52. The Commission is "not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *Federal Trade Commission* v. *Ruberoid Company*, *supra*, at 473; see also *May Department Stores Company* v. *National Labor Relations Board*, 326 U. S. 376, 390 (footnote

10, subparagraph 3 (a)). A cease-and-desist order may restrain "other like or related unlawful acts" (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436), as long as such other violations "bear some resemblance to that which the * * * [respondent] has committed or * * * danger of their commission in the future is to be anticipated from the course of * * * conduct in the past" (*id.*, p. 437).

Under these standards, the Commission was fully warranted in entering a cease-and-desist order against all six categories of misbranding, even though it found violations involving only three of them. The six categories are closely interrelated, and it is not unjustifiable to assume that one who repeatedly commits violations involving several of the categories is likely, unless restrained, to commit violations involving others. For example, a retailer who frequently failed to disclose that fur is bleached or dyed, as respondent did, may reasonably be expected also to fail to disclose that the product includes used or other undesirable types of fur. The Commission found that respondent had committed 85 statutory violations involving three of the labeling requirements, and also 187 violations of Commission regulations. In the circumstances, a prohibition which also includes the three other labeling requirements cannot be said to have "no reasonable relation to the unlawful practices found to exist." *Siegel* case, *supra*, p. 613. See also *Local 167, Int'l Brotherhood of Teamsters* v. *United States*, 291 U. S. 293.

The fact that Congress, in defining "misbranded" in Section 4 of the Act, specified six categories of required information does not curtail the Commission's "wide discretion" to choose "a remedy deemed adequate to cope with the unlawful practices" (*Siegel* case, *supra*, p. 611)—a discretion which, as we have shown (*supra*, p. 12), authorizes the proscription of "related unlawful acts." The offense which Section 3 condemns is "misbranding" and, as the Commission stated (App. 154), "[u]nder the Act, a fur product is misbranded * * * unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4 (2)." The six specified categories of required information, therefore, "do not deal with separate violations in and of themselves, nor do they recognize or excuse misbranding * * * in varying degrees"; they merely amplify the statutory command that there be "attach[ed] to a fur garment an adequate label * * *" (App. 154).

The decision below, if allowed to stand, would handicap the Commission in enforcing not only the Fur Products Labeling Act but also the Wool Products Labeling Act (enacted in 1940). For, as the Commission pointed out (App. 156), if it were limited to requiring disclosure only of the particular categories of information that had not been given, new proceedings would have to be instituted to deal with "subsequent omissions not theretofore resorted to but similarly violative of the public policy expressed in the subsection." In order to avoid such "multiplicity

of actions," the Commission's "long established policy" under the Wool Products Labeling Act has been to include in its orders "prohibitions against failure to disclose on labels all elements of information required by that subsection [Section 4 (2), 15 U. S. C. 68b] even though failure to disclose some elements of information were not involved in various of the cases" (*ibid.*). It has also "generally" followed the same practice with respect to orders under the Fur Act directed against misbranding and false invoicing (*ibid.*).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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JULY 1958.

APPENDIX A

(Federal Trade Commission Docket 6434)

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 12128 September Term 1957—January Session 1958

MANDEL BROTHERS, INC., A CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION TO SET ASIDE AN ORDER OF THE FEDERAL TRADE COMMISSION. APRIL 1, 1958

Before DUFFY, *Chief Judge,* SCHNACKENBERG and PARKINSON, *Circuit Judges.*

PARKINSON, *Circuit Judge.* The petitioner, Mandel Brothers, Inc., is a Delaware corporation. It owns and operates a large department store in Chicago, Illinois with annual sales of approximately $32,000,000. It has two fur departments, one on the fifth floor and the other in the basement.

The petitioner is here seeking to set aside a cease and desist order entered July 5, 1957 under the Fur Products Labeling Act, Title 15 U. S. C. A. § 69 *et seq.* by the respondent Federal Trade Commission. There are five contested issues.

The first is whether the petitioner's activities constitute interstate commerce subject to the jurisdiction of the Federal Trade Commission.

The parties stipulated that furs and fur products sold by petitioner were shipped to and received by it from outside the State of Illinois. Petitioner's fur department managers testified that they went to New York City ten or twelve times a year to buy furs for their departments and that most of the furs that are sold in the petitioner's store are bought there. There was also evidence that the petitioner advertised in the *Chicago Tribune,* the *Chicago Sun-Times* and the *Chicago American,* all of which, as stipulated by the parties, have interstate circulation and that furs were sold to non-residents of Illinois and sent to an out of state address. The witness Hill, manager of petitioner's fifth floor fur department, testified that Commission's Exhibit 12, a sales slip, had no Illinois sales tax thereon and therefore the goods would have to be delivered outside the State of Illinois. Commission's Exhibits 19 and 20 also show similar sales to residents of Indiana upon which no Illinois sales tax had been charged. Accordingly there was ample evidence in the record from which the Commission could find that the petitioner was engaged in interstate commerce. *DeGorter* v. *Federal Trade Commission,* 9 Cir., 1957, 244 F. 2d 270. The case of *Federal Trade Commission* v. *Bunte Brothers,* 1941, 312 U. S. 349 cited by the petitioner is inapposite in that Bunte Brothers' sales were made exclusively in Illinois.

The second issue is whether the Commission's Rule 44 under the Act is a valid exercise of the authority delegated to the Commission.

Section 8 (a) (1) (b) of the Act authorizes the Commission to prescribe, *inter alia,* such rules and regulations as may be necessary and proper for pur-

poses of the administration and enforcement of the Act.

Section 5 (a) (5) provides:

> "For the purpose of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement * * * which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur * * * contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur; * * *."

We agree with the Ninth Circuit in *DeGorter* when it said, "the intention was to reach all *misrepresentations in advertising,* including those relating to prices and value. If any doubt exists about the matter the clause under consideration indicates the intention to include them. The Commission was right in so interpreting the statute and acted within its powers in promulgating the rule under discussion."

The Commission found that certain fur products sold by the petitioner for $244 were the same ones advertised in the *Chicago Tribune* on October 2, 1954 as "Usually $299 to $399" the net effect of which was to mislead and deceive purchasers as to the amount of savings to be realized. We believe that finding is supported by substantial evidence. Mandel called its manager of the fifth floor fur department as a witness but made no attempt to prove these garments were usually sold at $299 to $399. Petitioner's contention that the issue here is not the regular and usual price of the specific garments sold by Mandel but the regular and usual price of similar or comparable garments fails inasmuch as the customer would make no such distinction. Moreover, there is no evidence in this record that the regular and usual

price of similar or comparable garments was $299 to $399.

The third issue is whether the evidence as to labeling, invoicing, advertising and record-keeping is such as to warrant and support the Commission's cease and desist order.

What we have held as to advertising is dispositive of that question. The evidence of Mandel's fur salon manager that Mandel had no definite records showing the garments that had been sold at the advertised price gives adequate support to the order of the Commission as to inadequate record-keeping.

As to the labeling the Hearing Examiner found that Mandel had not violated subdivisions (B), (D) and (E) of § 4 (2) of the Act and his cease and desist order did not include these subdivisions. The Commission, on appeal, specifically found that there was no evidence as to violations of these same subdivisions but did include them in its cease and desist order. The Supreme Court in its opinion in *Federal Trade Commission* v. *Ruberoid Co.*, 1952, 343 U. S. 470, 473 held that, "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" and also in *Federal Trade Commission* v. *National Lead Co.*, 1957, 352 U. S. 419, 431 "that those caught violating the Act must expect some fencing in." However, here the Commission specifically found that there was no evidence of any violation of subdivisions (B), (D) and (E) of § 4 (2). We find no difficulty in subscribing to the doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to

cease and desist from doing that which the Commission specifically found it did not do.

The petitioner concedes that it has violated subdivisions (A), (C) and (F) of § 4 (2) and Rules 4 and 29 promulgated under § 8 (a) (2) (b). It attempts to excuse its violations upon the ground that they are technical and trivial. If such an excuse were valid the enforcement of the Act would be virtually impossible. In this we find no merit.

The Commission contends that when Mandel failed to place certain information upon the sales slip given to the consumer that constituted a violation of § 3 (b) of the Act. Petitioner argues that a sales slip is not an "invoice" within the meaning of the Act. The word "invoice" has an accepted meaning in the commercial world. It is a written account or itemized statement of merchandise shipped or sent to a purchaser or consignee with the quantity, value or prices and charges set forth. However, the Fur Products Labeling Act defines the term and we must look to that definition for its meaning.

Section 2 (f) of the Act defines "invoice" as:

> "a written account, memorandum, list, or catalog, *which is issued in connection with any commercial dealing* in fur products or furs, and describes the particulars of any fur products or furs transported or delivered to a purchaser, * * * or any *other* person *who is engaged in dealing commercially in fur products or furs.*" (Our emphasis.)

This statutory definition is plain and unambiguous and to come within its terms an "invoice" must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially*. Under no circumstances is a sales slip given to a customer by a re-

tailer a written account, memorandum, list, or catalog issued in connection with a commercial dealing. An invoice is not brought down to the retail level by this section.

The respondent attempts to buttress its position with excerpts from hearings before a congressional committee. However, when the language used in a statute is clear and unambiguous its legislative history cannot control the interpretation as "such aids are only admissible to solve doubt and not to create it." *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company*, 1922, 257 U. S. 563, 589. "In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms." *United States* v. *Shreveport Grain & Elevator Co.*, 1932, 287 U. S. 77, 83. There is no doubt as to the meaning of "invoice" as defined by the statute. It is clearly not a sales slip at the retailer-customer level.

We agree with the Commission that a limiting clause is to be restrained to the last antecedent unless the subject requires a different construction. If the last antecedent were "any person" instead of "any other person" the word "purchaser" might not be limited to one engaged in dealing commercially in fur products or furs. However, when the statute says purchaser or any *other* person who is so engaged the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs.

The fourth issue is whether the Commission, having found that there was no evidence of certain violations, properly included prohibition of those violations in its cease and desist order. As the order must be modified and those portions deleted therefrom pursuant to our determination of the third issue consideration of this issue is no longer necessary.

The fifth issue is whether the Commission properly imposed its cease and desist order on Mandel's officers, representatives, agents and employees when only Mandel itself was named in the complaint.

The petitioner is a corporation. A corporation can act only through its agents. This rule of law is so elementary that citation of authorities is certainly not required.

We did hold in *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission,* 7 Cir., 1951, 192 F. 2d 535, 540 that the Commission was without authority to include officers, agents, representatives and employees in its cease and desist order. We did make a distinction in *Anchor Serum Company* v. *Federal Trade Commission,* 7 Cir., 1954, 217 F. 2d 867, 874. We have given careful consideration to the question and have come to the conclusion that we were in error in *Reynolds.* Accordingly so much of our decision therein as pertains to this question is overruled.

We hold that the Commission did have the power to include in its cease and desist order Mandel's officers, representatives, agents and employees.

The cease and desist order here under review is hereby ordered modified by deleting therefrom subdivisions (b), (d) and (e) of subsection 1 of A and all of B.

The order as modified is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO 10, ILLINOIS,
Tuesday, April 1, 1958.

Before Hon. F. RYAN DUFFY, *Chief Judge;* Hon. ELMER J. SCHNACKENBERG, *Circuit Judge;* Hon. W. LYNN PARKINSON, *Circuit Judge.*

No. 12128

MANDEL BROTHERS, INC., A CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO SET ASIDE AN ORDER OF THE FEDERAL TRADE COMMISSION

This cause came on to be heard on the petition to review and set aside an order of the Federal Trade Commission, and the transcript of record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the cease and desist order here under review be modified by deleting therefrom subdivisions (b), (d), and (e) of subsection 1 of A and all of B, and the said order as modified is affirmed.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. —, OCTOBER TERM, 1957

FEDERAL TRADE COMMISSION, PETITIONER,

v.

MANDEL BROTHERS, INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 30th, 1958.

/s/ TOM C. CLARK,
Associate Justice of the Supreme Court of the United States.

Dated this 25th day of June 1958.

APPENDIX D

The Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq.*, provides in pertinent part as follows:

SECTION 2. As used in this Act—

* * * * *

(f) The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs. [15 U. S. C. 69 (f)]

SECTION 3.

(a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(c) The introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur which is falsely or deceptively advertised or falsely or deceptively invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b) is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. [15 U. S. C. 69a]

* * * * *

SECTION 4.

For the purposes of this Act, a fur product shall be considered to be misbranded—

(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or if the label contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product;

(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

(F) the name of the country of origin of any imported furs used in the fur product;

(3) if the label required by paragraph (2) (A) of this section sets forth the name or names of any animal or animals other than the name or names provided for in such paragraph. [15 U. S. C. 69b]

SECTION 5.

(a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the

animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(2) does not show that the fur is used fur or that the fur product contains used fur, when such is the fact;

(3) does not show that the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;

(4) does not show that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur;

(6) does not show the name of the country of origin of any imported furs or those contained in a fur product.

(b) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively invoiced—

(1) if such fur product or fur is not invoiced to show—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name and address of the person issuing such invoice;

(F) the name of the country of origin of any imported furs or those contained in a fur product;

(2) if such invoice contains the name or names of any animal or animals other than the name or names specified in paragraph (1) (A) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur. [15 U. S. C. 69c]

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In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
The invoicing violations	3
The labeling violations	5
Summary of argument	7
Argument:	
I. The prohibitions of the Fur Products Labeling Act against false and deceptive invoicing apply to retail sales	11
A. The statutory definition of "invoice" covers invoicing to retail consumers	13
B. The legislative history of the Fur Products Labeling Act reflects a Congressional purpose to protect consumers from false and deceptive invoicing of fur products at the retail level	16
C. The settled administrative construction of the Act is that its invoicing provisions apply to retail sales	24
II. The Commission, upon finding that respondent had failed to include on its labels three of the six categories of information required by the Act, properly directed inclusion of all six categories	27
Conclusion	35
Appendix A	36
Appendix B	40

CITATIONS

Cases:	
Alaska S. S. Co. v. *United States*, 290 U. S. 256	27
Black v. *Magnolia Liquor Co.*, 355 U. S. 24	24, 26
De Gorter v. *Federal Trade Commission*, 244 F. 2d 270	22
Federal Housing Adm'n v. *The Darlington, Inc.*, 358 U. S. 84	10, 26

Cases—Continued

	Page
Federal Trade Commission v. *Martin Berdy*, S. D. N. Y., Civil Action 122–366	32
Federal Trade Commission v. *Fairfield Wool Co.*, D. Conn., Civil Action 7422	32
Federal Trade Commission v. *Fibre Enterprises, Inc.*, S. D. N. Y., Civil Action 136–243	32
Federal Trade Commission v. *Gratz*, 253 U. S. 421	34
Federal Trade Commission v. *Kulin Waste Co.*, D. Mass., Civil Action 57–707–W	32
Federal Trade Commission v. *Morton Salt Company*, 334 U. S. 37	29
Federal Trade Commission v. *Ruberoid Company*, 343 U. S. 470	29, 32
Federal Trade Commission v. *South Village Mills*, D. Mass., Civil Action 58–566–M	32
Flemming v. *Florida Citrus Exchange*, No. 27, this Term, decided Dec. 15, 1958, slip op., p. 10	9, 14, 22
Ed Hamilton Furs, Inc., 51 F.T.C. 186	25
International Salt Company v. *United States*, 332 U. S. 392	32
Jacob Siegel Company v. *Federal Trade Commission*, 327 U. S. 608	10, 11, 29, 31
Knowlton v. *Moore*, 178 U. S. 41	14
Local 167, Int'l Brotherhood of Teamsters v. *United States*, 291 U. S. 293	31, 32
Magnolia Liquor Co. v. *Cooper*, 231 F. 2d 941	26
Maguire v. *Commissioner*, 313 U. S. 1	14
May Department Stores Company v. *National Labor Relations Board*, 326 U. S. 376	29, 32–33
National Labor Relations Board v. *Express Publishing Co.*, 312 U. S. 426	11, 29, 31, 33
O'Hara v. *Luckenbach S. S. Co.*, 269 U. S. 364	18
Puget Sound Elec. Ry. v. *Benson*, 253 Fed. 710	15
Shapiro v. *United States*, 335 U. S. 1	18
United States v. *American Trucking Ass'ns*, 310 U. S. 534	10, 25
United States v. *Bramblett*, 348 U. S. 503	14
United States v. *Hughes*, 116 F. 2d 613	15
United States v. *Sullivan*, 332 U. S. 689	12
United States v. *Union Pac. R. R.*, 91 U. S. 72	14
United States v. *Zucca*, 351 U. S. 91	25
White v. *United States*, 191 U. S. 545	14

Statutes:

Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq*. Page 2, 7, 11, 16, 17, 27, 28, 33, 36
Section 2 (f), 15 U. S. C. 69 (f) 3, 8, 13, 14, 15, 23, 36
Section 3 (a), 15 U. S. C. 69a (a) 3, 10, 12, 23, 27, 36
Section 3 (b), 15 U. S. C. 69a (b) 3, 8, 10, 12, 23, 27, 36
Section 3 (c), 15 U. S. C. 69a (c) 37
Section 4, 15 U. S. C. 69b 5, 6, 10, 27, 30, 31, 33, 37
Section 5 (b), 15 U. S. C. 69c (b) 3, 23, 38
Section 7, 15 U. S. C. 69e 5, 33
Section 8 (1), 15 U. S. C. 69f 33
Wool Products Labeling Act, 15 U. S. C. 68, *et. seq*. 32, 34

Congressional material:

95 Cong. Rec. 9513–9514 20
95 Cong. Rec. 9517 16
97 Cong. Rec. 6695 22
97 Cong. Rec. 6701 17
97 Cong. Rec. 6879 17
97 Cong. Rec. 9004–9007 17
97 Cong. Rec. 9106 17
97 Cong. Rec. 10,366 17
Hearing on H. R. 3734 (House), 80th Cong., 2d sess. 18, 19
Hearings on H. R. 4292, 97 and 3755 (House), 81st Cong., 1st sess. 17, 18, 31
Hearings on H. R. 5187 (Senate), 81st Cong., 1st sess. 20
H. Rep. 2004, 80th Cong., 2d sess. 16, 19, 20
H. Rep. 919, 81st Cong., 1st sess. 16, 20
H. Rep. 546, 82d Cong., 1st sess. 17, 20, 22
H. Rep. 769, 82d Cong., 1st sess. 17
H. R. 3734, 80th Cong., 1st sess. 14, 16, 17
H. R. 3734 (Union Calendar No. 979), 80th Cong., 2d sess. 16, 19
H. R. 97, 81st Cong., 1st sess. 20
H. R. 3755, 81st Cong., 1st sess. 14, 20
H. R. 5187, 81st Cong., 1st sess. 16
H. R. 2321, 82d Cong., 1st sess. 16, 17
S. 1388, 80th Cong., 1st sess. 14
S. 508, 82d Cong., 1st sess. 16
S. Rep. 2378, 81st Cong., 2d sess. 16
S. Rep. 78, 82d Cong., 1st sess. 7–8, 9, 11, 17, 20, 21, 31

Miscellaneous:

	Page
Annual Reports of the Federal Trade Commission:	
1954	25
1957	25
Federal Trade Commission's "Rules and Regulations Under the Fur Products Labeling Act," 16 C. F. R. (Supp. 1958) Part 301:	
Rule 4	6
Rule 27	5
Rule 29 (a)	6
Rule 29 (b)	6
2 Sutherland, *Statutory Construction*, 448–449 (3d ed., 1943)	15

In the Supreme Court of the United States

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No. 234

FEDERAL TRADE COMMISSION, PETITIONER

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MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

OPINION BELOW

The opinion of the Court of Appeals (R. 67–72) is reported at 254 F. 2d 18.

JURISDICTION

The judgment of the Court of Appeals modifying the Commission's order, and affirming it as modified, was entered on April 1, 1958 (R. 72). The court's final decree, enforcing the order as modified, was entered on May 8, 1958 (R. 73–75). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark on June 25, 1958, to July 30, 1958 (R. 76). The petition for a writ of certiorari was filed on July 30, 1958, and was granted on October

13, 1958 (R. 77). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether sales at the retail level are outside the scope of the provisions of the Fur Products Labeling Act prohibiting false and deceptive invoicing.

2. Whether the Federal Trade Commission, in issuing cease-and-desist orders against failure to label fur products properly, is confined to proscribing the precise labeling omissions which it found.

STATUTE INVOLVED

The relevant portions of the Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq.*, are set forth in Appendix A, *infra*, pp. 36–39.

STATEMENT

On October 27, 1955, the Federal Trade Commission issued a complaint charging that respondent, which operates a large retail department store in Chicago, Illinois, had violated the Fur Products Labeling Act (R. 1–5). After full administrative proceedings, the Commission, adopting the examiner's findings (with minor modifications), issued its opinion (R. 31–45) holding that respondent had violated the Act as charged, and entered a cease-and-desist order (R. 28–31). The principal violations found were misbranding by failure to attach proper labels, false and deceptive invoicing, and false and deceptive advertising. The Court of Appeals modified the order in two important respects, and affirmed and enforced its other provisions (R. 67–72). The court eliminated

the prohibition against false and deceptive invoicing, on the ground that the Act does not extend to invoices given to retail customers; and it held that the prohibitions against misbranding were too broad.

THE INVOICING VIOLATIONS

Section 3 (a) of the Act (15 U. S. C. 69a (a)) makes it unlawful to sell "in [interstate] commerce * * * any fur product which is misbranded or falsely or deceptively advertised or invoiced * * *"; and Section 3 (b) (15 U. S. C. 69a (b)) makes it unlawful to sell "any fur product which is made in whole or in part of fur which has been shipped and received in [interstate] commerce, and which is misbranded or falsely or deceptively advertised or invoiced * * *." Section 5 (b) (15 U. S. C. 69c (b)) provides that a fur product or fur is falsely or deceptively invoiced if not invoiced to show (A) the name of the animal that produced the fur; where applicable, that the product (B) contains used fur, (C) contains bleached, dyed, or artificially colored fur, or (D) is composed in whole or substantial part of paws, tails, bellies, or waste fur; (E) the "name and address" of the person issuing such invoice; and (F) the country of origin of any imported furs. Section 2 (f) of the Act (15 U. S. C. 69 (f)) defines "invoice" as "a written account, memorandum * * * which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee * * *, or any other person who is engaged in dealing commercially in fur products or furs."

The Commission found that respondent had violated the invoicing provisions of the Act because its invoices did not show its address, and in several instances did not disclose that the fur was bleached, dyed, or otherwise artificially colored, and failed to set forth the correct name of the animal producing the fur (R. 35). The Commission rejected respondent's contention that the Act is not applicable to retail invoicing. It stated (R. 36–37) that "a prime purpose of the Act was to eliminate deceptive invoicing at the consumer level"; that it has "consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer"; and that respondent's contention would "render the Act ineffective in a major respect."

The Court of Appeals eliminated the prohibitions relating to invoicing, on the ground that under the statute a sales slip given to a retail customer is not an "invoice". The court ruled that an invoice "must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially*" in furs, and that, "[u]nder no circumstances is a sales slip given to a customer by the retailer * * * issued in connection with a commercial dealing" (R. 70). The court refused to consider the legislative history of the Act, on the ground that when statutory language is "clear and unambiguous its legislative history cannot control the interpretation * * *" (R. 71).

THE LABELING VIOLATIONS

Section 4 of the Act (15 U. S. C. 69b) provides that a fur product is misbranded (1) if it is "falsely or deceptively labeled * * * or identified," (2) if there is not affixed a label setting forth six specific items of information which (with one minor exception) are identical with those which Section 5 (b) requires an invoice to contain,[1] or (3) if the label designates the animal that produced the fur by some name other than that prescribed in the Fur Products Name Guide (a register of the names of hair, fleece and fur-bearing animals which Section 7 of the Act (15 U. S. C. 69e) requires the Commission to maintain). The "label" to which the Act refers, however, is not a label in the ordinary sense of a piece of cloth permanently affixed to the garment by sewing; it is merely a ticket or tag temporarily attached to the garment, apparently by tying (R. 47, 62–64, 64A, 66B; see Rule 27 of the Commission's Rules and Regulations under the Act, 16 C. F. R. (Supp. 1958) 301.27).

The Commission found the following violations of the Act's labeling requirements: 12 instances of failure to label the product with the correct name of the animal producing the fur (Section 4 (2) (A)), 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored (Section 4 (2) (C)), and 58 instances of failure to show the country of origin of imported furs (Section 4 (2)

[1] Section 4 (2) (E) requires the label to show the name of the person who manufactures the fur product, rather than the "name and address" of the person issuing the invoice.

(F)) (R. 12). The Commission further found 187 violations of its rules which provide additional labeling requirements and standards (R. 12).[2] The Commission held, however, that there was "no evidence that the labels affixed to respondent's fur products were deficient in that they failed to disclose that the fur products were composed of used fur [Section 4 (2) (B)], or were composed of paws, tails, bellies, or waste fur [Section 4 (2) (D)], or that they failed to disclose respondent's name [Section 4 (2) (E)] * * *" (R. 28).

Although the examiner recommended that the cease-and-desist order be limited to the three categories of information found to have been omitted (R. 26), the Commission's order directed respondent to cease and desist from "Misbranding fur products by: * * * Failing to affix labels to fur products showing" the six categories of information required by Section 4 (2) (R. 29). The Commission stated (R. 42–43) that "[u]nder the Act a fur product is misbranded * * * unless it has attached to it a label setting forth clearly and conspicuously all the data indicated as necessary to be included thereon by Section 4 (2)"; that the subsections "do not deal with separate violations in and of themselves" (*ibid.*); and that "in any case in which it is found that the

[2] In 9 instances, required information was improperly set forth in abbreviated form; in 59 instances, non-required information was mingled with required information; and in 119 instances, required information was set forth in handwriting (R. 12), in violation of Rules 4, 29 (a), and 29 (b), respectively, of the Commission's "Rules and Regulations Under the Fur Products Labeling Act," 16 C. F. R. (Supp. 1958) Part 301.

labeling * * * requirements * * * have not been fully complied with, the appropriate conclusion is that the fur products in connection with which the deficiencies have occurred have been misbranded * * * and that the appropriate order to be issued in correction of the offense is one requiring cessation of the practice, namely, the misbranding * * * by failure to attach proper labels * * *" (R. 43–44).[1]

The Court of Appeals struck from the order the prohibitions against the three categories as to which no violations were found. Although stating it accepted the "doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in," the court refused to "affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do" (R. 69–70).

SUMMARY OF ARGUMENT

I

One of the purposes of the Fur Products Labeling Act was "[t]o protect consumers * * * against deception * * * resulting from the * * * false invoicing of fur products and furs" (S. Rep. 78, 82d Cong.,

[1] The Commission reached the same conclusion with respect to the scope of the order directed against invoicing violations. It enjoined respondent from failing to furnish invoices containing the six categories of information required by the Act (R. 30), even though it found (R. 28) that there was "no evidence" that three of those categories had been omitted from its invoices. Since the Court of Appeals held that the part of the order dealing with the invoicing violations was beyond the Commission's statutory authority, it did not reach the question of its scope.

1st sess., p. 1; see 65 Stat. 175). Section 3 (b), which prohibits the sale of any falsely or deceptively invoiced fur product made of fur which has been shipped in interstate commerce, on its face applies to retail sales. The Court of Appeals, however, solely on the basis of a narrow interpretation of the statutory definition of "invoice" and without considering either the purpose, legislative history or settled administrative interpretation of the Act, held the false invoicing prohibitions inapplicable to retail sales.

A. Section 2 (f) defines "invoice" as "a written account, memorandum, [etc.] * * * which is issued in connection with any commercial dealing in fur products or furs and describes the particulars of any fur products or furs, transported or delivered to a purchaser [etc.] * * * or any other person who is engaged in dealing commercially in fur products or furs." Giving these words their ordinary and usual meanings, the ultimate consumer who buys a fur garment from a retail dealer is a "purchaser," the sale to such "purchaser" is a "commercial dealing," and the sales memorandum issued in connection with the transaction is an "invoice". The Court of Appeals erred in holding that the last phrase of the definition, "who is engaged in dealing commercially in fur products or furs," modifies not only the immediately preceding words "any other person," but also the prior terms of the definition, including "purchaser."

B. In any event, the court below erred in holding that the definition of "invoice" is so "clear and unambiguous" as to preclude resort to legislative history.

This history shows that Congress intended to protect retail consumers of fur products from false and deceptive invoicing.

Representatives of the fur industry testified at the Congressional hearings that proper invoicing was necessary to protect the retail customer. They pointed out that the "label" on a fur product is merely a ticket or tag which the customer ordinarily does not preserve and that the invoice serves as a permanent record. Following this testimony, the false invoicing provisions of the bill were strengthened, and the present definition of "invoice" was added. The Senate Committee Report stated that one of the Act's purposes was "[t]o protect consumers * * * against deception * * * resulting from the * * * false invoicing of fur products and furs * * * " (S. Rep. 78, 82d Cong., 1st sess., p. 1), and the title of the Act reflects the same purpose. There is no "substantial contrary indication in the legislative history" (*Flemming* v. *Florida Citrus Exchange,* No. 27, this Term, decided December 15, 1958, slip op., p. 13) of any intent to exempt retail invoicing from the Act's prohibitions of false and deceptive practices; respondent's contention that the invoicing provisions of the Act were intended to apply only to furs, and not to fur products, is contrary to numerous specific provisions of the Act.

C. The Commission has consistently construed the false and deceptive invoicing provisions of the Act as applicable to retail sales. This interpretation, which recognizes that truthful retail invoicing is necessary if consumers of fur products are to enjoy the full protection which Congress intended the Act to give them

against deceptive practices, is "entitled to great weight." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549; *Federal Housing Adm'n* v. *The Darlington, Inc.*, 358 U. S. 84, 90.

II

The Court of Appeals also erred in modifying the scope of the Commission's order directed against respondent's misbranding violations. Section 3 of the Act forbids the sale of a "misbranded" fur product, and Section 4 declares that a fur product is "misbranded" if, *inter alia*, the label attached to it fails to set forth six specified categories of information. The Commission, upon finding that in numerous instances respondent had failed to include three categories of required information, but that there was "no evidence" that it had failed to furnish the three other categories, ordered respondent to cease and desist from "[m]isbranding fur products by * * * [f]ailing to affix labels" showing each of the six categories of information. The Court of Appeals struck from the order the prohibitions dealing with the three categories of information with respect to which the Commission held there was "no evidence" of violation.

We submit that the Commission did not abuse its "wide discretion in its choice of a remedy" (*Jacob Siegel Company* v. *Federal Trade Commission*, 327 U. S. 608, 611) in concluding that the "appropriate" order to correct the statutory offense of misbranding by omitting required information from labels "is one requiring cessation of the practice, namely, the misbranding * * * by failure to attach proper labels

* * *" (R. 43–44). The six subcategories of information which the Act requires a properly branded fur product to contain do not involve separate offenses; they are merely component elements of the single offense of misbranding. The subcategories are closely interrelated, and it is not unreasonable to assume that one who has omitted several of the categories is likely, unless restrained, to commit violations involving others. The Commission's broad discretion to select an appropriate remedy includes the power to proscribe "like or related unlawful acts" (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436); an order requiring respondent to furnish all six categories of information cannot be said to have "no reasonable relation to the unlawful practices found to exist" (*Siegel* case, *supra*, at 613). The decision below in effect limits the Commission to proscribing the precise violations found by it, and unduly limits its discretion to select an appropriate remedy.

ARGUMENT

I. THE PROHIBITIONS OF THE FUR PRODUCTS LABELING ACT AGAINST FALSE AND DECEPTIVE INVOICING APPLY TO RETAIL SALES

Congress enacted the Fur Products Labeling Act "[t]o protect [*inter alia*] consumers * * * against deception * * * resulting from the misbranding, false or deceptive advertising, or *false invoicing* of fur products and furs * * *" (S. Rep. 78, 82nd Cong., 1st sess., p. 1, emphasis added; see also the title of the Act, 65 Stat. 175). To provide such protection Congress, in addition to prohibiting various transactions in inter-

state commerce involving falsely or deceptively invoiced fur products (Section 3 (a)), further prohibited the "sale * * * of any fur product * * * which is * * * falsely or deceptively * * * invoiced," if such product is made in whole or in part of fur which has been shipped in interstate commerce (Sec. 3 (b)). On their face, these broad provisions would appear to make the false invoicing prohibitions applicable to all sales of fur products, including retail sales, over which the Commission has jurisdiction. Cf. *United States v. Sullivan*, 332 U. S. 689.

The Court of Appeals, however, relying solely upon a narrow reading of the statutory definition of "invoice" and without considering the basic policy of the legislation, its legislative history, or its settled administrative interpretation, concluded that the statutory prohibitions against false invoicing are not applicable to retail sales. We believe that this ruling is clearly erroneous, and that carving out such an exemption from the Act's prohibitory provisions would, as the Commission stated (R. 36–37), "defeat the congressional declaration of purpose and render the Act ineffective in a major respect."

We shall show that the language of the Act, properly construed, does cover false and deceptive invoicing at the retail level; that the legislative history reflects a Congressional purpose generally to protect consumers of fur products and furs from false and deceptive practices, and specifically to protect them against false invoicing; that denying retail consumers the protection of the statutory prohibitions against false invoicing would substantially limit the protec-

tion against misbranding which Congress provided for purchasers of fur products; and that the court below failed to give proper weight to the settled administrative construction of the Act by the agency charged with its enforcement.

A. The Statutory Definition of "Invoice" Covers Invoicing to Retail Consumers

In view of the legislative purpose to protect consumers against false invoicing of fur products (see *infra*, pp. 16–21), we doubt that the statutory definition of "invoice" can fairly be construed as limiting the reach of the Act's prohibitions against the sale of "any fur product * * * which is * * * falsely or deceptively * * * invoiced." But in any event we submit that, properly read, the definition does cover invoices at the retail level.

Section 2 (f) of the Act defines "invoice" as

> a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs.

Giving these words their ordinary and usual meanings, the ultimate consumer who purchases a fur product from a retail dealer is a "purchaser"; the sale to such a "purchaser" is a "commercial dealing"; and the sales invoice or memorandum issued in connection with such a transaction is an "invoice." Such

a construction is necessary to carry out the Congressional purpose, declared in the Act's title[4] and reflected in its legislative history (see *infra*, pp. 16–21), of "protect[ing] consumers and others against * * * false invoicing of fur products and furs" (65 Stat. 175). "[W]e deal here with remedial legislation whose language should be given hospitable scope" (*Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 26) "[i]n the light of the over-all purpose of the Act * * *" (*Flemming* v. *Florida Citrus Exchange*, No. 27, this Term, decided December 15, 1958, slip opinion, p. 10).

The Court of Appeals, however, ignored these considerations, and instead gave Section 2 (f) the "narrowest possible meaning in complete disregard of the purpose of the legislature" (*United States* v. *Brambletl*, 348 U. S. 503, 509–510). The court ruled (R. 70) that the last phrase in the definition—"who is engaged in dealing commercially in fur products or furs"—modifies not only the immediately preceding

[4] The title of a statute may be considered in construing it (*Maguire* v. *Commissioner*, 313 U. S. 1, 9–10; *Knowlton* v. *Moore*, 178 U. S. 41, 65; *White* v. *United States*, 191 U. S. 545, 550), especially where, as here, the title "seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing" the Act. *United States* v. *Union Pac. R. R.*, 91 U. S. 72, 82. The title of the original bills (H. R. 3734, S. 1388, 80th Cong., 1st sess.), "[t]o protect consumers [and others] * * * from misnaming, misbranding, improper identification, and deceptive or misleading advertising" of fur products, was changed in H. R. 3755 (81st Cong., 1st sess.) to its present title of a bill to "protect consumers and others against misbranding, false advertising, and false *invoicing* of fur products and furs" (emphasis added).

words "any other person," but also all the other preceding terms in the section, including "purchaser". It therefore held that to come within the statutory definition "an 'invoice' must be something issued in connection with a commercial dealing to a purchaser or any *other* person who is engaged in *dealing commercially*" (R. 70, emphasis in original); and that since a retail consumer is not engaged in commercial dealing "[a]n invoice is not brought down to the retail level by this section" (*ibid.*).

But it is a settled rule of statutory construction, with which the court below itself "agree[d]" (R. 71), that "a limiting clause is to be restrained to the last antecedent unless the subject matter requires a different construction."[8] Plainly, the subject matter of Section 2 (f) does not require "a different construction"; on the contrary, making the limiting clause applicable to the preceding terms of the definition would create a serious gap in the regulatory scheme (see *infra*, pp. 22, 26). The correct construction of Section 2 (f), we submit, is that Congress designated all the specific categories of persons to whom it intended the invoicing requirements to apply *i. e.*, purchasers, factors, bailees, etc., and then added a general catch-all of "any other person who is engaged in dealing commercially in fur products or furs."

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[8] *United States* v. *Hughes*, 116 F. 2d 613, 616 (C. A. 3); *Puget Sound Elec. Ry.* v. *Benson*, 253 Fed. 710 (C. A. 9); 2 Sutherland, *Statutory Construction*, 448-449 (3d ed., 1943).

B. The Legislative History of the Fur Products Labeling Act Reflects a Congressional Purpose to Protect Consumers from False and Deceptive Invoicing of Fur Products at the Retail Level

In point IA, we have shown that the language of the statutory prohibitions against false invoicing covers retail sales. But in any event, we submit that the court below plainly erred in holding (R. 71) that the definition of "invoice" is so "clear and unambiguous" as to preclude resort to legislative history. That history manifests a strong Congressional policy of protecting retail consumers of fur products from the dangers of false and deceptive invoicing.

The Fur Products Labeling Act became law during the 82nd Congress. However, during the 80th and 81st Congresses, a number of bills containing substantially the same provisions were introduced and extensively considered.* The hearings, reports and

*In the 80th Congress, the original bill (H. R. 3734, 80th Cong., 1st sess.) was, during the second session, favorably reported by the House Committee (H. Rep. 2004, 80th Cong., 2d sess.) with amendments (see H. R. 3734 (Union Calendar No. 979), 80th Cong., 2d sess.) after extensive hearings, but no further action was then taken. In the 81st Congress, two bills (H. R. 97 and 3755), both similar to H. R. 3734 in the preceding Congress (see Hearings on H. R. 4292, 97 and 3753 (House), 81st Cong., 1st sess., p. 38) were the basis of further hearings, after which the committee reported out (see H. Rep. 919, 81st Cong., 1st sess.) an amended bill (H. R. 5187, 81st Cong., 1st sess.) which passed the House (95 Cong. Rec. 9517). Although recommended by the Senate Committee (see S. Rep. 2378, 81st Cong., 2d sess.) after further hearings, this bill stood on the Senate calendar at adjournment. In the 82d Congress, two new bills (H. R. 2321 and S. 508), substantially identical with the bill passed by the House in the previous

debates on these earlier bills throw considerable light upon the objectives of the Act, and particularly its prohibitions against false and deceptive invoicing. The Committee Reports on the Act emphasize its substantial identity with the predecessor bills, and refer to legislative materials from the earlier Congresses. S. Rep. 78, 82nd Cong., 1st sess., p. 1; H. Rep. 546, 82nd Cong., 1st sess., p. 3.

As originally introduced in the 80th Congress, the bill (H. R. 3734, 80th Cong., 1st sess.) prohibited, *inter alia*, the sale "in commerce, of any fur article, or any imported fur, which is misbranded or falsely or deceptively advertised or invoiced" (Section 3 (a)), and prescribed limited circumstances under which "a fur article or imported fur shall be considered to be falsely or deceptively advertised or invoiced" (Section 6). It did not, however, define the term "invoice." At the committee hearings, industry spokesmen almost unanimously endorsed legislation requiring full disclosure on retail invoices as the simplest and most effective way to protect consumers

Congress (see H. Rep. 546, 82nd Cong., 1st sess., p. 3; S. Rep. 78, 82d Cong., 1st sess., p. 1), were introduced. H. R. 2321 passed the House (97 Cong. Rec. 6701) after hearings and a committee report (H. Rep. 546, *supra*); it passed the Senate with amendments (97 Cong. Rec. 6878) but without hearings. The bill then went to conference. After the Senate (97 Cong. Rec. 9004–9007) and the House (97 Cong. Rec. 9106) had accepted the conference report (H. Rep. 769, 82d Cong., 1st sess.), the President signed the Act on August 8, 1951 (97 Cong. Rec. 10,366) to take effect a year later (see 65 Stat. 181).

from deceptive practices.[7] In construing a statute, such testimony may properly be considered to show the evils which Congress intended to cure. *O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 367–369; see also, *Shapiro* v. *United States*, 335 U. S. 1, 11–15.

One witness urged that "[i]nvoicing * * * would be the best protection" for the unknowledgeable consumer against false and deceptive practices (Hearing on H. R. 3734, 80th Cong., 2d sess., p. 109), and that "[p]roper invoicing * * * would solve the problem in much the same manner" as labeling without the difficulty supposedly entailed by a labeling requirement (*id.*, p. 119). Other witnesses anticipated "a great possibility for benefit to the consumer in requiring a complete disclosure of the name and origin of the fur in the invoice" (*id.*, p. 157), and pointed out that invoices are already voluntarily issued to consumers "almost in every instance" (*id.*, p. 195, see p. 138) by the "vast majority", at least, of the reputable retail fur dealers (*id.*, pp. 120–121; see p. 161).

Another witness pointed to the consumer's need for an invoice because of the impermanency of the label in a fur garment. Such a tag or label, although attached to the garment, "may be shifted", and the purchaser "will disregard a tag just as we throw tags away which come on the clothes we buy" (*id.*, p. 120).

[7] Hearing on H. R. 3734 (House), 80th Cong., 2d sess., pp. 109, 119, 122–123 (Stein), 120–121 (Albach), 154, 156–157, 161 (Benedek), 168 (Weber). For similar testimony in succeeding Congresses, see Hearings on H. R. 4292, 97, and 3755 (House), 81st Cong., 1st sess., pp. 175–176 (Albach); and Hearings on H. R. 5187 (Senate), 81st Cong., 1st sess., pp. 73 (Majerus), 130 (Albach).

Because purchasers "are more likely to throw away a tag than a proper invoice", they "should get an invoice from their retailer representing what they have gotten in proper language and when that is done, you have the answer to your problem" of misrepresentation (*ibid.*).[8]

After these hearings, the committee reported back (see H. Rep. 2004, 80th Cong., 2d sess.) a version of the bill (H. R. 3734, Union Calendar No. 979) which expanded and strengthened the invoicing prohibitions,

[8] The value to the consumer of an invoice for a fur product is illustrated by one witness' "experience in the last few days":

> Mr. ALBACH [representing a large fur manufacturer]: * * * A lady came to us and said, "I have bought a Hollander dyed coat which somehow does not look like the coat that my friend bought."
>
> We asked her where she bought it and where her friend bought hers. She told us that her friend bought hers from Bambergers in Newark, one of our very fine stores. This lady had bought hers at a corner retailer somewhere in the outlying district.
>
> * * * * *
>
> We said to her, "Now, this is not a Hollander seal. However, you would have to prove that you bought a Hollander seal coat. Have you such proof?" She said, "Yes. I have a bill which was given to me by the retailer selling me a Hollander seal coat."
>
> We referred her to the Better Business Bureau and she was able to get her money back, because they had misrepresented it.
>
> Now, to me, that seems to be the complete answer. * * *
>
> * * * * *
>
> Mr. HESELTON [Congressman from Massachusetts]: That is a very interesting statement. It leads me at least to the feeling that you have now disclosed the very sort of thing that the bill is intended to reach and that is the unethical misrepresentation on the part of the few. * * *
>
> [House Hearing on H. R. 3734, 80th Cong., 2d sess., p. 120.]

giving them substantially their present form. In the amended bill, the present definition of "invoice" was added (*id.*, Section 2 (e)); the prohibitions against false and deceptive invoicing were extended to cover furs generally, as well as fur products (*id.*, Section 3 (b)); and the section detailing the circumstances when a fur product is falsely or deceptively invoiced was substantially expanded to its present scope (*id.*, Section 5 (b)). We submit that these changes in the bill, made after the unanimous testimony by industry representatives as to the consumers' need for legislation guaranteeing adequate retail invoices, reflect a Congressional purpose to proscribe invoicing violations at the retail level.[9]

This purpose is also shown by the Committee Reports in the 82nd Congress, which indicate a Congressional intent to give consumers broad protection against unfair and deceptive practices, including false invoicing (S. Rep. 78, 82d Cong., 1st sess., pp. 1, 3; H. Rep. 546, 82d Cong., 1st sess., pp. 1, 4).[10] And, as

[9] Although no further action was taken in the 80th Congress on this bill, similar bills were introduced in the 81st Congress (H. R. 97 and 3755, 1st sess.). At the hearings thereon, witnesses again pointed out that the invoice serves as "a permanent record of the true name [of the fur] to the consumer" of the fur product, and thus "affords the final complete protection as to any misnamings" (Hearings on H. R. 5187, 81st Cong., 1st sess., p. 73).

[10] The Committee Reports in the 80th and 81st Congresses also emphasized the need to protect consumers from false and deceptive practices, including misleading invoicing. H. Rep. 2004, 80th Cong., 2d sess., *passim*, especially pp. 1, 2; H. Rep. 919, 81st Cong., 1st sess., especially pp. 2, 3; S. Rep. 2378, 81st Cong., 2d sess., pp. 2, 3. See also, 95 Cong. Rec. 9513-9514 (statement of Rep. O'Hara in debate in House).

we have noted (*supra*, pp. 18–19), Congress previously had been informed of the need for an adequate retail invoice.

The Senate Report stated that one of the two purposes of the bill which became the Fur Act was "[t]o protect *consumers* and scrupulous merchants against deception and unfair competition resulting from the misbranding, false or deceptive advertising, or *false invoicing* of fur products and furs * * *" (S. Rep. 78, *supra*, p. 1, emphasis added). The report also stated that "fur when offered and sold to the buying public often has had its natural appearance materially changed by processing and dyeing", primarily "for the purpose of giving the article the appearance of being a fur of a higher quality or grade than it actually is, or for the purpose of imitating the more costly fur of an entirely different animal" (*id.* p. 2); that, as a consequence, it "is difficult and generally impossible for the American housewife to know what she is buying unless reliable factual information is disclosed to counteract the impression left with her as a result of the deceptive condition of the particular fur article of wearing apparel" (*ibid.*); and that the prohibitions contained in the Act "will effectively check types of advertising, *invoicing*, and labeling which by implication are calculated to mislead one as to the habitat of the animal, a matter regarded by many consumers as having considerable bearing on the quality and character of furs" (*id.*, p. 4, emphasis added).

The House Committee was also "unanimous in the belief that legislation is required to protect consumers of furs and fur products" (97 Cong. Rec. 6695). The Committee Report (H. Rep. 546, 82nd Cong., 1st sess.) pointed to the "widespread abuses arising out of the frequent practice in the fur trade of using, in advertisements and otherwise, in a false or misleading manner, foreign animal names and glamorous, fictitious designations for furs and fur products" (*id.*, p. 1), and concluded that "[t]his legislation will go far towards protecting consumers" (*id.*, p. 2), and fulfilling "the objective of this bill of promoting truthful advertising, *invoicing,* and labeling of furs and fur products * * *" (*id.*, p. 3, emphasis added).

In view of this clear Congressional design fully to protect consumers of furs and fur products, it would be anomalous for Congress to have made the advertising and mislabeling prohibitions applicable to retail transactions (as it did in Section 3, see *De Gorter* v. *Federal Trade Commission,* 244 F. 2d 270 (C.A. 9) and the decision below, R. 67-69), and yet to have denied retail customers the same protection against false invoicing—particularly since an invoice is such an important element in effectively protecting retail purchasers (see, *supra,* pp. 18–19; *infra,* pp. 26–27).

Nor is there "any substantial contrary indication in the legislative history" (*Flemming* v. *Florida Citrus Exchange,* No. 27, this Term, decided December 15, 1958, slip opinion, p. 13) that retail invoicing is ex-

empt from the Act's disclosure requirements. Contrary to respondent's suggestion (Br. in Opp. 7), the shorthand description of the Act in several of the Committee Reports as requiring "mandatory invoicing of furs and labeling of fur products" does not show any Congressional intent that "the desired protection for the consumer was to be achieved by requiring a label on the fur product" (Br. in Opp. 10). For, as we have shown (*supra*, pp. 16–22), the legislative history indicates that Congress was concerned with insuring that retail consumers would receive adequate invoices, and not just proper labels. Indeed, testimony presented to Congress emphasized that even proper labels would not adequately protect the consumer. (See *supra*, pp. 18–19, *infra*, pp. 26–27.)

Respondent's contention also flies in the face of the fact that most of the provisions of the Act dealing with invoicing apply to fur products as well as furs. For example, Sections 3 (a) and 3 (b) prohibit the sale "of any fur product which is * * * deceptively advertised or invoiced", and Section 5 (b) (15 U. S. C. 69c) sets forth the circumstances when "a fur product or fur shall be considered to be falsely or deceptively invoiced * * *." Furthermore, Section 2 (f) definies "invoice" as "a written account, memorandum * * * which is issued in connection with any commercial dealing in *fur products or furs*, and describes the particulars of any *fur product or furs*, transported or delivered to a purchaser, consignee, * * * or any other person who is engaged in dealing commercially in *fur products or furs*" (emphasis

added).[11] Thus, while the main thrust of the Act may have been against mislabeling of fur products, Congress also outlawed false and deceptive invoicing of such products, and not just of furs.[12]

C. The Settled Administrative Construction of the Act Is That Its Invoicing Provisions Apply to Retail Sales

As its opinion points out (R. 36), the Commission "has consistently construed the statute's proscriptions against false and deceptive invoicing to extend to invoices or sales slips furnished by retailers to the purchasing consumer." In "the first [complaint] issued under the Fur Products Labeling Act since it

[11] If, as respondent contends, the Act's invoicing provisions are applicable only to transactions involving furs, a retailer such as respondent would not be entitled to receive invoices covering its purchases of fur products from manufacturers. Yet obviously such invoices are issued in connection with a "commercial dealing in fur products," and respondent, as consignee, is a "person who is engaged in dealing commercially in fur products."

[12] Respondent also relies (Br. in Opp. 7–8) upon testimony by a Commission official (Henry Miller) at the House Hearings during the 80th Congress, that in his view "a good label * * * is a more effective remedy" than an invoice. But Miller was merely stating his personal opinion of the comparative merits of these two methods of protecting consumers; he did not state that invoicing was unnecessary. As we have shown, Congress found it unnecessary to choose between these methods, since it gave consumers the double protection of proper labeling and proper invoicing. Furthermore, since the effective date of the Act, the Commission (as distinguished from one of its officials) consistently has interpreted the Act's invoicing provisions as applicable to retail sales. See *infra*, pp. 24–25.

ecame effective in August 1952," the Commission harged a retailer with "[m]isrepresentation in the sale f fur products at retail," including a "failure to dis-lose on * * * invoices" the data required by the Act. 954 Annual Report of the Federal Trade Commis-ion, pp. 31–32, referring to *Ed Hamilton Furs, Inc.*, 1 F. T. C. 186, 188. Since then, the Commission as issued 137 additional complaints charging viola-ion of the Act involving false and deceptive retail nvoicing; 22 of these are currently pending before he agency. There are presently outstanding 110 ease-and-desist orders relating to retail invoicing.[13] Such a " 'contemporaneous construction of a statute by the men charged with the responsibility of setting ts machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'" is "entitled to great weight." *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 549; *United States* v. *Zucca*, 351 U. S. 91, 96, and cases there cited. "In circumstances no more ambiguous than the present we have allowed contemporaneous administrative construction to carry the day against doubts that might exist from a reading

[13] In addition, the Commission has approved 92 stipulations under which furriers accused of false and deceptive retail invoicing (against whom no complaint has been filed, however) have agreed to discontinue such practices. See 1957 Annual Report of the Federal Trade Commission pp. 61–62, for a description of the Commission's stipulation practice.

Appendix B, *infra*, pp. 40–45, contains a list of Commission complaints and orders, and stipulations, relating to retail invoicing.

of the bare words of a statute." *Federal Housing Adm'n* v. *The Darlington, Inc.*, 358 U. S. 84, 90.[14]

The Commission's settled interpretation of the Act recognizes the importance of truthful invoicing at the retail level if ultimate consumers of fur products are to enjoy the full protection which Congress intended the Act to give them. Respondent's contention that the label itself adequately protects consumers (Br. in Op. 5–6), and that a retail invoice "would add no benefit for" them (*id.*, p. 10), overlooks the fact that fur product "labels" are not labels in the ordinary sense of pieces of cloth permanently sewn into the garments. These "labels" are merely "tags" or "tickets", apparently attached to the garments by tying, which the retail purchaser is "likely to throw away" after the purchase. See *supra*, pp. 5, 18–19. The invoice, on the other hand, constitutes the retail purchaser's permanent record, and, in all probability, will commonly be retained long after the "'label" has been lost or destroyed. The Commission, therefore, correctly stated (R. 37) that since "the invoice may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor, the application of the invoicing provisions of the Act to

[14] Respondent contends (Br. in Opp. 11–12) that this settled administrative construction is of "doubtful weight" because it is reflected in cases which were settled by consent. But a consistent agency interpretation is no less valid because the cases in which it was applied were settled by consent rather than by litigation. See *Black* v. *Magnolia Liquor Co.*, 355 U. S. 24, 26, reversing *Magnolia Liquor Co.* v. *Cooper*, 231 F. 2d 941, 946 (C. A. 5).

transactions between retailers and consumers represents a key implement for effective administration of the Act." "Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to" "where, as here, the declared will of the legislative body could not [otherwise] be carried out." *Alaska S. S. Co.* v. *United States*, 290, U. S. 256, 262.

II. THE COMMISSION, UPON FINDING THAT RESPONDENT HAD FAILED TO INCLUDE ON ITS LABELS THREE OF THE SIX CATEGORIES OF INFORMATION REQUIRED BY THE ACT, PROPERLY DIRECTED INCLUSION OF ALL SIX CATEGORIES

Section 3 of the Fur Products Labeling Act makes it unlawful to sell, advertise, etc., any fur product which is "misbranded." Section 4 provides that a fur product "shall be considered to be misbranded" (1) if it is falsely or deceptively labeled or identified, (2) if there is not affixed to it a label showing six specified categories of information, or (3) if the label sets forth the name of the animal that produced the fur other than as provided in the Commission's Fur Products Name Guide. The six categories of information required by subsection (2) are: (A) the name of the animal that produced the fur; where applicable, that the product (B) contains used fur, (C) contains bleached, dyed, or artificially colored fur, or (D) is composed of paws, tails, bellies, or waste fur; (E) the name of the manufacturer of the fur product, and (F) the country of origin of any imported furs.

The Commission found that respondent had committed a substantial number of violations of three of

the disclosure requirements in subsection (2),[15] but that there was "no evidence" that it had not complied with the other three requirements (see *supra*, pp. 5–6). The Commission rejected the examiner's recommendation that the order should be "limited to requiring cessation of the * * * deficiencies found" (R. 42), and ordered respondent to cease and desist from "Misbranding fur products by: 1. Failing to affix labels to fur products showing" each of the six categories of information required by subsection (2) (R. 29). The Court of Appeals, however, struck from the order the prohibitions with respect to the three categories as to which there was "no evidence" of violation, on the ground that it could not "affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do" (R. 70).

We believe that this ruling, which in effect limits the Commission to proscribing the precise labeling violations which it finds, unduly and improperly restricts the agency's power to provide adequate relief against violations of the mislabeling and false invoicing provisions of the Fur Products Labeling Act.[16]

This Court has consistently recognized that the Commission has "wide discretion in its choice of a

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[15] The Commission also found that respondent had committed 187 violations of its rules governing labels (R. 12).

[16] In the case of the invoicing violations the Commission similarly prohibited respondent from failing to furnish invoices containing the six required categories of information, even though it found "no evidence" of violation with respect to three categories. See *supra*, note 3. The reasons which we give for sustaining the scope of the Commission's order against mislabeling are equally applicable to the false invoicing provisions and similarly justify its scope.

remedy deemed adequate to cope with the unlawful practices" disclosed in its proceedings. *Jacob Siegal Company* v. *Federal Trade Commission*, 327 U. S. 608, 611; *Federal Trade Commission* v. *Ruberoid Company*, 343 U. S. 470; cf. *Federal Trade Commission* v. *Morton Salt Company*, 334 U. S. 37, 51–52. The Commission is "not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Federal Trade Commission* v. *Ruberoid Company*, *supra*, at 473; see also *May Department Stores Company* v. *National Labor Relations Board*, 326 U. S. 376, 390 (footnote 10, subparagraph 3 (a)), but may restrain "other like or related unlawful acts" (*National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436), as long as such other violations "bear some resemblance to that which the * * * [respondent] has committed or * * * danger of their commission in the future is to be anticipated from the course of * * * conduct in the past" (*id.*, p. 437); *May Department Stores Company* v. *National Labor Relations Board*, *supra*, at 392.

We submit that the Commission did not abuse its "wide discretion in its choice of a remedy" in holding that the "appropriate" order to correct the statutory offense of misbranding by omitting required information from labels "is one requiring cessation of the practice, namely, the misbranding or false invoicing by failure to attach proper labels or to issue proper invoices" (R. 43–44). The Commission correctly pointed out (R. 42–43) that the labeling violations which the statute condemns "consist of the failure to attach to a fur garment an adequate label as there

prescribed," and "the offense of misbranding * * * occurs * * * by reason of failure * * * to include on a label * * * each of the items of information which the statute requires." The fact that Congress specified six categories of information which a label must contain in order to avoid misbranding does not mean that each of these categories is a separate offense for purposes of determining the permissible scope of a cease-and-desist order. As the Commission stated (R. 42–43), "[t]he subsections do not deal with separate violations in and of themselves, nor do they recognize or excuse misbranding or false invoicing in varying degrees." The offense is misbranding, and Congress has merely specified particular kinds of information which a label on a properly branded garment must contain.

Since, as the Commission stated (R. 43), the "requirements specified for an adequate label in subsection (2) of Section 4 are closely interrelated," it is not unreasonable to assume that one who repeatedly omitted several of the categories of information is likely, unless restrained, to commit violations involving others. For example, a retailer who frequently failed to disclose that fur is bleached or dyed, as respondent did (R. 12), may reasonably be expected also to fail to disclose that the product contains used or other undesirable types of fur." This is particularly so here

[17] Respondent argues that, "[i]n view of the varying degrees of reprehensibility of the several categories" of information required by Section 4 (2), "[t]he occurrence of violations which are almost technical in quality affords no basis for sound expectation that there will occur other violations of a definitely misleading nature" (Br. in Opp. 15). But, as the Commission noted (R. 43), the Act does not "recognize or excuse misbrand-

where, two years after the labeling violations were first uncovered by a Commission investigator (in September, 1952), a subsequent investigation (in October, 1954) disclosed further violations (R. 46–55). In the circumstances, a prohibition which also includes the three other labeling requirements cannot be said to have "no reasonable relation to the unlawful practices found to exist." *Siegel* case, *supra*, at 613. The Commission's broad discretion to select an appropriate remedy includes the power to proscribe "like or related unlawful acts." *Express Publishing* case, *supra*, at 436.

In *Local 167, Int'l Brotherhood of Teamsters* v. *United States*, 291 U. S. 293, a Sherman Act decree was attacked on the ground, *inter alia*, that although it enjoined the conspirators from coercing "marketmen to buy poultry, poultry feed, or other commodities necessary to the poultry business from particular sellers thereof", the evidence showed only coercion as

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ing or false invoicing in varying degrees"; violation of particular standards which Congress prescribed cannot be excused as merely "technical". In any event, respondent committed at least one "definitely misleading" violation when it failed, in 15 instances, to disclose that the fur product contained bleached, dyed or otherwise artificially colored fur (Section 4 (2) (C)). Precisely because fur "has had its natural appearance materially changed by processing and dyeing", primarily to "imitat[e] the more costly fur of an entirely different animal," it is "difficult and generally impossible for the American housewife to know what she is buying" without "reliable factual information" (S. Rep. 78, 82d Cong., 1st sess., p. 2). Similarly, respondent's 58 instances of failure properly to disclose the country of origin of imported furs (R. 12) cannot be deemed "technical," in view of the legislative history indicating the need for disclosure of the origin of imported furs (see House Hearings on H. R. 97 and 3755, 81st Cong., 1st sess., p. 44).

to chicken coops sold by a single company. Rejecti
a contention that the injunction should be simila
limited, this Court declared (p. 299) that

> The lack of specific evidence that coercion h
> been practiced or is threatened in respect
> every detail or commodity is no adequa
> ground for striking out the clause or for limi
> ing it to a mere specification of the coop
> Having been shown guilty of coercion in r
> spect of the coops in which poultry is kept a
> fed, appellants may not complain if the injun
> tion binds generally as to related commoditi
> including feed and the like.[18]

Similar reasoning supports the Commission's acti
in this case with respect to the "related" three cat
gories of information which respondent did not om
from its labels. Administrative agencies have th
"same power to determine the needed scope of cea
and desist orders" as courts have, when authorize
to issue injunctions, in other litigation". *May D*

[18] Cf. *International Salt Company* v. *United States*, 332 U.
392, 400; *Federal Trade Commission* v. *Ruberoid Company*, 3
U. S. 470, 473–474.

In judicial proceedings brought by the Commission for i
junctive relief against mislabeling under the similar provisio
of the Wool Products Labeling Act (15 U. S. C. 68, *et seq.*
the district courts have ordered that labels include all cat
gories of required information, even though the violatio
charged involved only failure to furnish some of the categorie
E. g., *Federal Trade Commission* v. *Martin Berdy*, S. D. N. Y
Civil Action 122–366, order of July 23, 1957; *Federal Trade Co*
mission v. *Kulin Waste Company*, D. Mass., Civil Action 5
707–W, order of August 1, 1957; *Federal Trade Commission*
South Village Mills, D. Mass., Civil Action 58–566–M, order
May 29, 1958; *Federal Trade Commission* v. *Fibre Enterprise*
Inc., S. D. N. Y., Civil Action 136–243, order of November 2
1958; *Federal Trade Commission* v. *Fairfield Wool Co.*, D. Conn
Civil Action 7422, order of November 24, 1958.

partment Stores Company v. *National Labor Relations Board, supra,* at 391–392."

The broad relief directed by the Commission in this case rests upon sound considerations of public policy, since it is designed to insure effective enforcement of the prohibitions in the Fur Products Labeling Act against deceptive practices in the fur industry. As the Commission pointed out (R. 44), if it were limited in prohibiting mislabeling (or false invoicing) to requiring disclosure only of the particular categories of information that had not been given, new proceedings would have to be instituted to deal with "sub-

[1] The instant case is significantly different from *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, upon which respondent relies (Br. in Opp. 16). There this Court held that the Board, upon finding that an employer had "refused to bargain as required by § 8 (5) of the Act," (p. 429), had erred in prohibiting not only such refusal to bargain, but also any interference with, or restraint or coercion of, its employees' rights to self-organization guaranteed by Section 7 of the Act—the denial of which rights was made an unfair labor practice by Section 8(1). The Court stated (p. 434) that the various unfair labor practices defined in the Act were "not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all." In the instant case, however, the various subcategories of subsection (2) are so closely related that "the commission of" several "merits * * * an order restraining all." Furthermore, although the various unfair labor practices were separate statutory offenses, each of the subcategories of Section 4 (2) is not a separate offense; they are component elements of the single offense of misbranding. Finally, the provision of the order which was invalidated in *Express Publishing* was a broad ban which "in effect" directed the employer to "refrain from violating the Act in any manner whatever" (p. 430); in the instant case the provisions struck by the Court of Appeals were merely itemizations of particular subdivisions of the offense of misbranding.

sequent omission not theretofore resorted to bu similarly violative of the public policy expressed i the subsection." In order to avoid such "multiplicit of actions," the Commission, in administering the Fu Products Act, has followed its "long established policy" under the Wool Products Labeling Act (en acted in 1940) of including in its orders "prohibition against failure to disclose on labels all elements o information required by that subsection [Section (2) of the Wool Act, 15 U. S. C. 68b], even thoug failure to disclose some elements of information wer not involved in various of the cases" (*ibid.*). Such orders are a proper "prophylactic" and "preventiv measure taken in the interest of the general public" (Mr. Justice Brandeis, dissenting, in *Federal Trad Commission* v. *Gratz*, 253 U. S. 421, 432, 435).

CONCLUSION

The judgment of the Court of Appeals, in so far as it modified the Commission's order, should be reversed, and the case remanded with directions to affirm and enforce the entire order.

Respectfully submitted.

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APPENDIX A

The Fur Products Labeling Act, 65 Stat. 175, 15 U. S. C. 69, *et seq.*, provides in pertinent part as follows:

SECTION 2. As used in this Act—

* * * * *

(f) The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs. [15 U. S. C. 69 (f)]

SECTION 3.

(a) The introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product which is misbranded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(b) The manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, and which is mis-

branded or falsely or deceptively advertised or invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act.

(c) The introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur which is falsely or deceptively advertised or falsely or deceptively invoiced, within the meaning of this Act or the rules and regulations prescribed under section 8 (b), is unlawful and shall be an unfair method of competition, and an unfair and deceptive act or practice, in commerce under the Federal Trade Commission Act. [15 U. S. C. 69a]

* * * * *

SECTION 4.

For the purposes of this Act, a fur product shall be considered to be misbranded—

(1) if it is falsely or deceptively labeled or otherwise falsely or deceptively identified, or if the label contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product;

(2) if there is not affixed to the fur product a label showing in words and figures plainly legible—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name, or other identification issued and registered by the Commission, of one or more of the persons who manufacture such fur product for introduction into commerce, introduce it into commerce, sell it in commerce, advertise or offer it for sale in commerce, or transport or distribute it in commerce;

(F) the name of the country of origin of any imported furs used in the fur produet;

(3) if the label required by paragraph (2) (A) of this section sets forth the name or names of any animal or animals other than the name or names provided for in such paragraph. [15 U. S. C. 69b]

SECTION 5.

(a) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively advertised if any advertisement, representation, public announcement, or notice which is intended to aid, promote, or assist directly or indirectly in the sale or offering for sale of such fur product or fur—

(1) does not show the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(2) does not show that the fur is used fur or that the fur product contains used fur, when such is the fact;

(3) does not show that the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;

(4) does not show that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) contains the name or names of any animal or animals other than the name or names specified in paragraph (1) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur;

(6) does not show the name of the country of origin of any imported furs or those contained in a fur product.

(b) For the purposes of this Act, a fur product or fur shall be considered to be falsely or deceptively invoiced—

(1) if such fur product or fur is not invoiced to show—

(A) the name or names (as set forth in the Fur Products Name Guide) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to section 7 (c) of this Act;

(B) that the fur product contains or is composed of used fur, when such is the fact;

(C) that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(D) that the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(E) the name and address of the person issuing such invoice;

(F) the name of the country of origin of any imported furs or those contained in a fur product;

(2) if such invoice contains the name or names of any animal or animals other than the name or names specified in paragraph (1) (A) of this subsection, or contains any form of misrepresentation or deception, directly or by implication, with respect to such fur product or fur. [15 U.S.C. 69c]

APPENDIX B

Complaints and Orders Issued by the Federal Trade Commission Under the Fur Products Labeling Act Involving Retail Invoicing (as of December 19, 1958)

Docket No.	Respondent	Order
6159	Ed Hamilton Furs, Inc.	Yes.
6296	Feuer Fur Co.	Yes.
6297	Pelta Furs	Yes.
6298	The Fur Doctor	Yes.
6299	Mac Goldman Co.	Yes.
6300	Einbenders	Yes.
6301	Parisian Fur Co.	Yes.
6337	Denning-Golden Furs, Inc.	Yes.
6371	H. J. Strauss Furs	Yes.
6429	Feller's, Inc.	Yes.
6433	S. A. Barker Co.	Yes.
6439	Evans Fur Co.	Yes.
6481	Gould's, Inc.	Yes.
6501	Benton Furs	Yes.
6503	LeAnn Fine Furs	Yes.
6509	Vancouver Fur Factory	Yes.
6513	Mawson DeMany Forbes	Yes.
6514	Buckspan's	Yes.
6530	N. L. Kaplan, Inc.	Yes.
6542	Beckman-Hammer Furs	Yes.
6558	I. J. Fox, Inc.	Yes.
6562	Roslyn Furs, Inc.	Yes.
6573	Saks Fur Co.	Invoicing charge dismissed.
6574	Beckerman Fur Corp.	Yes.
6588	Indiana Fur Co., Inc.	Yes.
6586	Stein Bros. Fur Co., Inc.	Yes.
6587	Fred Benioff Co.	Yes.
6629	International Fur Co.	Yes.
6631	Maurice Ball Furs	Yes.
6645	Furs by Kent	Yes.
6649	Phillip's Furs	Yes.
6657	Bernard Axelrod & Co.	Yes.
6659	Walker-Scott Co.	Yes.
6661	Meier & Frank Co.	Yes.
6663	Lipman, Wolfe & Co.	Yes.

Complaints and Orders Issued by the Federal Trade Commission Under the Fur Products Labeling Act Involving Retail Invoicing (as of December 19, 1958)—Continued

Docket No.	Respondent	Order
6664	Urist & Toplon	Yes.
6660	Frank Gould Fur Co	Yes.
6668	Koslows	Yes.
6680	S. C. Allen Furs Inc	Yes.
6683	Kaye-Ben Co., Inc	Yes.
6694	M. H. Peltz, Inc	Yes.
6715	Halote Bros	Yes.
6730	The House of Kudra Furs	Yes.
6731	Benard's Furs	Yes.
6739	Tolchinsky's Fur Shop	Yes.
6766	Philipson's	Yes.
6775	Siberian Fur Shop, Inc	Yes.
6777	Allen Waugh	Yes.
6778	The Halle Bros. Inc	Yes.
6781	I. Rubin, Inc	Yes.
6785	The Mayday Corp	Yes.
6786	Arctic Fur Co	Yes.
6805	Allied Stores of Ohio	Yes.
6813	International Co	Yes.
6819	Ellisberg's, Inc	Yes.
6822	The Fair	Dismissed.*
6825	Owens, Inc	Yes.
6828	Fettner Fur Co	Yes.
6834	The McAlpin Co	Yes.
6836	Federated Department Stores, Inc	Dismissed.*
6845	Nan Duskin, Inc	Yes.
6846	Furs by Koda, Inc	Yes.
6850	Teitelbaum Furs	Yes.
6851	Ransohoff's, Inc	Yes.
6862	A. Harris & Co	Yes.
6874	Samuel Glass	Yes.
6880	Annis Furs	Yes.
6881	Lester Conklin Furs	Yes.
6884	R. H. White Corp	Dismissed—store closed.
6895	Master Furriers, Inc. and Frank-Cunningham Stores Corp.	Yes.
6909	Henry C. Lytton & Co	Yes.
6917	Lurkin Furs, Inc	Yes.
6918	Master Furriers	Yes.
6921	Frank Gross Furs	Yes.
6930	Masonek & Bloom	Yes.

*Cited *Mandel* decision.

Complaints and Orders Issued by the Federal Trade Commission Under the Fur Products Labeling Act Involving Retail Invoicing (as of December 19, 1958)—Continued

Docket No.	Respondent	Order
6936	Jordan's, Inc	Yes.
6937	Dupler's Art Furs, Inc	Yes.
6946	Carl's	Yes.
6947	Consolidated Retail Stores, Inc	Dismissed—company reorganized.
6948	L. L. Berger, Inc	Yes.
6955	Blauner's	Pending.
6956	The Fashion	Yes.
6957	Nevius Bros	Yes.
6958	Freeman Fine Furs, Inc	Yes.
6959	Hartley Furs	Yes.
6960	H. Liebes & Co	Yes.
6970	Government Employees Exclusively	Yes.
6975	Kantrowitz & Neiditch Inc	Yes.
6976	Morton's, Inc	Pending.
6991	Goldrings Inc	Yes.
6992	Joske Bros. Co	Yes.
6993	Santa Ana Fur Co	Yes.
6998	Teitelbaum of Beverly Hills	Yes.
6999	Mercantile Stores Co., Inc	Yes.
7013	Greenhouse Furs, Inc	Yes.
7047	Gerschow Fur Co	Yes.
7055	E. L. Brownhill, Inc	Yes.
7062	Samuel A. Mannis	No proof found by Hearing Examiner.
7063	White Front Stores, Inc	Yes.
7064	Mannie Feigenbaum, Inc	Pending.
7071	Siegel's	Yes.
7084	The Higbee Co	Pending.
7088	H. Walzer & Co	Yes.
7093	Vaughan-Weil	Yes.
7098	Deluxe Fur Co	Yes.
7106	Arnold Constable Corp	Pending.
7108	Frank Gurak	Yes.
7111	Capitol Fur Shop	Yes.
7120	Fleisher's, Inc	Yes.
7124	World Arts Auction Gallery	Yes.
7153	Thomas & Noa Furs Inc	Yes.
7155	Ronay Furs Inc	Yes.
7157	Famous Furs Ltd	Yes.
7158	Baskin Furs Inc	Yes.
7159	Rich's Inc	Yes.
7161	Gittelman's Sons Inc	Yes.

Complaints and Orders Issued by the Federal Trade Commission Under the Fur Products Labeling Act Involving Retail Invoicing (as of December 19, 1958)—Continued

Docket No.	Respondent	Order
7172	D. H. Holmes Co., Ltd	Yes.
7173	H. P. Selman & Co., Inc	Yes.
7184	Associated Dry Goods Corp	Pending.
7185	Lloyd's Furs Inc	Yes.
7186	The John Bressmer Co	Yes.
7187	Furs by Weiss Inc	Pending.
7195	Hoving Corp	Pending.
7205	Smith Fur Co	Pending.
7206	B. Altman Co	Pending.
7200	Haber's Department Store, Inc	Pending.
7221	Miller Bros. Co., Inc	Yes.
7222	Teitelbaum Furs Ltd. of America	Pending.
7248	Canadian Fur Co	Pending.
7250	Felix Friedman	Pending.
7251	Furs by Gartenhaus	Pending.
7260	J. N. Adam & Co	Pending.
7263	Louis Pizitz Dry Goods Co. Inc	Pending.
7271	The Denver Dry Goods Co	Pending.
7291	Richard Donald Furriers Inc	Pending.
7295	Berdan Furs	Pending.
7299	Coleman's Fashion Shop	Pending.
7303	The Wurzburg Co	Pending.

Stipulations Approved by the Federal Trade Commission Involving Retail Invoicing of Fur Products (as of December 19, 1958)

Respondent	Stipulation No.
Grayson Apparel Company	8616
State Furriers	8635
Ritz Thrift Shop	8672
Miller Fur Company	8679
Jaskow Furs	8697
J. N. Adam & Company	8700
Owens, Inc	8711
Cummins Furs, Inc	8720
Marvin's Credit, Inc	8721
Cohen's Furs, Inc	8723
Consolidated Retail Stores, Inc	8725

Stipulations Approved by the Federal Trade Commission Involving Retail Invoicing of Fur Products (as of December 19, 1958)—Continued

Respondent	Stipulation No.
Rubin Fine Furs	8726
Lewin's	8732
L. L. Berger, Inc	8742
Jordan's, Inc	8743
Hopper Furs, Inc	8746
Chambers & Chambers, Inc	8747
Thomas & Noa Furs	8755
Arctic Fur Company	8757
Baskin Furs	8758
Maurice Kolinsky, Inc	8760
Stein's Furs, Inc	8761
Nina Wolff Furs	8763
Samuel Glass	8766
A. & J. Engel, Inc	8776
Stanley Furs, Inc	8779
Brown-Dunkin Company, Inc	8780
Yudofsky Furriers	8781
Franckowiak's, Inc	8788
C. E. Carlson Company	8792
Lustick Furriers	8795
Ralph H. Miller, Inc	8800
Berdan Furs, Inc	8803
J. Lichterman, Inc	8806
William Rosendorf	8809
Lowenthal's, Inc	8811
Seidenbach's, Inc	8812
Younger's	8822
David Gutter	8858
Sam Young	8860
Projansky, Inc	8862
Jorge's Furs, Inc	8863
Strawbridge & Clothier	8870
Moe Wolfe	8873
Ben Zuckerman, Inc	8875
Sorensen & Wahlberg	8882
Charles Barth & Son	8885
William Ackerman	8896
Grubman Brothers	8898
Sears, Roebuck & Company	8899
William A. Lewis Clothing Co	8901
Linenberg Brothers	8903
Oster Fur Exchange	8905

Stipulations Approved by the Federal Trade Commission Involving Retail Invoicing of Fur Products (as of December 19, 1958)—Continued

Respondent	Stipulation No.
Hudson Garment Company, Inc.	8914
All American Sportswear Company	8919
Carson Union May Stern, Inc.	8928
Gorman's, Inc.	8929
B. Gertz, Inc.	8933
Morris Gold, Inc.	8938
Hens & Kelly, Inc.	8942
Landsberg Brothers	8943
Block & Kuhl Company	8955
Sandler's Fur Shop	8956
Smith's Fur Shop	8958
Engel & Fetzer Company	8959
Buffum's	8960
S. Milenbach & Sons	8963
Reinstein-Berger, Inc.	8964
The Komiss Company	8974
Charles Main Street Corp.	8977
House of Erdrich	8985
Rizik Brothers, Inc.	8991
Baum Furs, Ltd.	9000
Stone & Thomas, Inc.	9002
Mirrow's	9007
Jacob Packer	9019
City Stores Company (Lit Bros.)	9029
Bankers Securities Corp. (Snellenberg)	9033
Erlebacher of Conn. Ave., Inc.	9040
Polonsky, Kane & Shuman	9041
Levin's Fur Shop	9043
Wayne Pepper Furs, Inc.	9046
Sydna Wynn	9048
Livingston Bros. Inc.	9052
Hafter-Pinsky	9053
The Paris Company	9065
Towncliffe, Inc.	9066
Jacob Klaff t/a Francine's	9077
Abrahams Brothers	9079
John Wanamaker Philadelphia, Inc.	9090
A. E. Tarlow & Company	9091
E. J. Korvette, Inc.	9097

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No. 234

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

v.

MARY DEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

Two points in respondent's brief call for a short reply.

1. Respondent argues (Br. 34–35) that since retail fur sales are intrastate, the Fur Products Labeling Act cannot constitutionally be applied to retail invoicing. However, as the Court of Appeals pointed out (R. 68), some of respondent's invoices covered fur products which were "delivered outside the State of Illinois." See Commission Exhibits 17 (Wisconsin), 19, 20, and 30 (Indiana) (not printed), and the Commission's opinion (R. 33). Thus, unlike the wholly intrastate penny-candy sales involved in *Federal Trade Commission* v. *Bunte Brothers,* 312 U.S. 349, upon which respondent relies (Br. 34), respond-

ent's sales of fur products were not "strictly local."

In any event, *United States* v. *Sullivan*, 332 U.S. 689, lays to rest any question as to the constitutionality of applying the Act to retail invoicing. That case upheld the conviction, under Section 301(k) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(k)), of a retail druggist for "misbranding" a drug while "held for sale after shipment in interstate commerce" (pp. 690–691). Section 502(f) of the Act (21 U.S.C. 352(f)) provides that a drug is "misbranded * * * [u]nless its labeling bears" certain information. The druggist had purchased in intrastate commerce drugs previously shipped in interstate commerce in properly labeled containers. However, he later resold the drugs in new packages without attaching a new label containing the required information. The Court held that the statute outlawed "misbranding articles held for sale after shipment in interstate commerce, without regard to how long after the shipment the misbranding occurred, how many intrastate sales had intervened, or who had received the articles at the end of the interstate shipment" (p. 696), and that the statute so interpreted was a valid exercise of the commerce power (pp. 697–698).

If Congress can require a retail druggist to reissue a label "for the information and protection of the consumer" (p. 695) covering drugs which have been shipped in interstate commerce, it can likewise require a retail fur dealer to furnish the consumer with an invoice, similarly designed for his "information and protection," covering fur products made of furs

shipped in interstate commerce. The scope of the commerce power does not turn upon possible technical differences, upon which respondent relies, between the preparation of an invoice and the statutory requirement under the Food and Drug Act that a druggist "put [labels] on * * * the boxes to which the tablets were transferred" (*Sullivan* case, *supra*, p. 697). Here, as in *Sullivan*, "the question relates to the constitutional power of Congress under the commerce clause to regulate the branding [or invoicing] of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce" (p. 698). This Court has decided that Congress has that power.

2. In urging that the court below properly modified the part of the order directed against misbranding, respondent makes the point (Br. 40) that the order did not merely direct it to cease and desist from "misbranding fur products by failing to affix labels to fur products showing each element of information required by the Act", but specified each such element. We construe the foregoing quoted language as having the same effect as the language used by the Commission, namely, it would prohibit failure to include all six categories of information required by the Act, and not just the three with respect to which the Commission found violation. In the circumstances, substituting the quoted language for that used by the Commission would not change the substance of the order, and would eliminate respondent's principal objection to the original order (Br. 36): that it might "suggest" "to the public" that the store "has sold garments containing

used fur or inferior parts of fur and has concealed the fact." While we believe, for the reasons set forth in our opening brief (pp. 27–34), that the order drafted by the Commission is valid, we would not object to a change in its form by substituting the quoted language suggested by respondent.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, *Petitioner*,

v.

MANDEL BROTHERS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE RESPONDENT

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INDEX

	Page
Questions presented	1
Statement of the case	2
Summary of argument	4
Argument:	
I. The sale slip from a retailer to the consumer upon the purchase of a fur garment is not subject to the invoicing requirements of the Fur Act; it is not an "invoice" as that term is defined in the Act	7
A. The statutory definition of "invoice" excludes invoicing from a retailer to the consumer, since the consumer is not "engaged in dealing commercially."	8
B. The legislative history of the Fur Products Labeling Act squarely supports the interpretation of the court below, that a sale slip at the retailer-consumer level is not an invoice within the Act	18
C. The administrative construction of the Act is erroneous in applying to retail sales the provisions with respect to invoices	31
D. Under the Constitution, the Fur Act's invoicing requirements may not validly be imposed on the local sale of a fur product by the retailer to the consumer	34
II. The Court of Appeals properly held that the Commission's order could not require respondent to cease and desist from doing that which the Commission had found respondent did not do	36
Conclusion	41
Appendix A	43
Appendix B	55

CITATIONS

CASES: Page

Black v. Magnolia Liquor Co., 355 U.S. 24 11
DeGorter v. Federal Trade Commission, 244 F. 2d 270 32
Federal Trade Commission v. Bunte Brothers, 312 U.S. 349 34
Flemming v. Florida Citrus Exchange, 358 U.S. 153 ..... 11, 29
May Department Stores v. National Labor Relations Board, 326 U.S. 376 38
National Labor Relations Board v. Express Publishing Co., 312 U.S. 426 ..... 38, 40
Porto Rico Ry. Co. v. Mor, 253 U.S. 345 ..... 5, 13
Railroad Commission of Wisconsin v. C.B.&Q.R.Co., 257 U.S. 563 11
Schechter Corporation v. United States, 295 U.S. 495 ..... 6, 34
Jacob Siegel Company v. Federal Trade Commission, 327 U.S. 608 38
United States v. Bramblett, 348 U.S. 503 11
United States v. Standard Brewery, 251 U.S. 210 ..... 4, 12
United States v. Sullivan, 332 U.S. 689 ..... 6, 35

STATUTES:

Fur Products Labeling Act:

Sec. 2(f) 8, 18
Sec. 3 27
Sec. 3(d) 16, 28
Sec. 3(e) 16, 28
Sec. 4(2) 36
Sec. 5(b) 27

CONGRESSIONAL MATERIAL:

Cong. Record July 14, 1949, p. 9700 51

Hearing on H.R. 3734, 80th Cong. (House) 19, 20, 22, 44
Hearings on H.R. 97 and H.R. 3755, 81st Cong. (House) 32, 49
Hearings on H.R. 2321, 82d Cong. (House) 33, 52
Hearings on S. 1388, 80th Cong. (Senate) 23, 45, 47

Page

H.R. 3734, 80th Cong. 18, 19, 25, 28, 32, 43, 48
H.R. 97, 81st Cong. 49
H.R. 3755, 81st Cong. 49
H.R. 5187, 81st Cong. 50, 51, 52
H.R. 2321, 82d Cong. 52, 54
S. 1388, 80th Cong. 19, 23, 25, 43, 49
S. 2703, 80th Cong. 18, 25, 49
S. 508, 82d Cong. 54

House Report No. 2004, 80th Cong. 26, 30, 48
House Report No. 919, 81st Cong. 30, 33, 50
House Report No. 546, 82d Cong. 30, 33, 53
House Report No. 769, 82d Cong. 55
Senate Report No. 2378, 81st Cong. 30, 33, 52
Senate Report No. 78, 82d Cong. 30, 33, 54

MISCELLANEOUS:

Federal Trade Commission's "Rules and Regulations under the Fur Products Labeling Act," 16 CFR 301 3

2 Sutherland *Statutory Construction*, 3d Ed., 1943, p. 448 12

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OCTOBER TERM, 1958

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FEDERAL TRADE COMMISSION, *Petitioner*,

v.

MANDEL BROTHERS, INC.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR THE RESPONDENT

Mandel Brothers, Inc., submits that the Court of Appeals did not err in its conclusions on the questions here involved, and that the judgment of that court should be affirmed.

QUESTIONS PRESENTED

The respondent respectfully suggests that the questions presented in this proceeding may be more accurately stated as:

1. Whether the sale slip given to the consumer upon the purchase of a fur product at retail is within

the definition of "invoice" in the Fur Products Labeling Act.

2. Whether the Federal Trade Commission, in issuing cease and desist orders against failure to label fur products properly, may proscribe labeling omissions of which it has concurrently "acquitted" the respondent.

STATEMENT OF THE CASE

The statement of the case in the brief for the Commission appears to be adequate for purposes of this proceeding, except for certain details in the portion dealing with the proper scope of the order with respect to labeling violations. For reasons set forth in the following paragraphs we suggest two changes in the statement:

(1) The second issue herein is whether the Commission properly included in its cease and desist order specific proscription of labeling deficiencies which it found had not been committed. It was found that certain labeling omissions had occurred. The quality and character of those omissions may aid in estimating the probability of occurrence of other omissions which the Commission found had not previously occurred, and thus may bear upon the propriety of enjoining omissions of the latter type. Accordingly, the respondent would amplify the statement in the first sentence in the second paragraph on page 5 of the Commission's brief so as to set forth the following information:

> The Commission found 12 instances of failure to label the product with the correct name of the animal producing the fur. They consisted of garments which were labeled "black seal" or "Alaska seal" instead of "fur seal"; "Persian" instead of "Persian lamb"; "tropical seal" instead of "hair seal"; and "Stuart hybrid" or "silver blue" instead of "mink." On one "dyed fox" garment, the species of fox was not named. (R. 48, 49)

The Commission found 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored. They included garments which were labeled as "black seal" or "black Persian lamb" without reference to having been dyed; there was testimony that those furs are not used commercially in black in their natural state, but are invariably dyed. Five muskrat coats bore no reference to having been dyed. Four mole jackets were labeled as "tipped" instead of "dyed" or "tip dyed." (R. 51, 52)

The Commission found 58 instances of failure to show the country of origin of imported furs. These consisted of about 15 cases where fur origin was omitted; a few garments on which the fur origin was stated in adjective form, e.g., "Russian" instead of "fur origin: Russia"; and 37 coats on which the fur origin was stated as "Outer Mongolia." The criticism on the last group was that Outer Mongolia is not a country but is a part of China.* (R. 50)

(2) The first sentence in the first full paragraph on page 6 of the brief for the Commission, describing the cease and desist order, may be susceptible of the interpretation that the language of the order directed respondent to cease and desist from "Misbranding fur products by: * * * Failing to affix labels to fur products showing the six categories of information required by section 4(2) of the Act." As a matter of fact, the order recited (in language closely paralleling the statutory language) each of the six categories of information without which a label is deficient, i.e., the three in which deficiencies had been found and also the three in which deficiencies had not been found. (R. 29) In the interest of exactitude, said

*Compare the Commission's Rule 12(b): "The term 'country' means the political entity known as a nation. Colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries and the name thereof shall be deemed acceptable in designating the 'country of origin' unless the Commission shall otherwise direct." (Rules and Regulations under the Fur Products Labeling Act, Title 16 C.F.R. 301.)

sentence in the Commission's statement of the case should read:

> Although the examiner recommended that the cease and desist order be limited to the three categories of information found to have been omitted, the Commission's order directed respondent to cease and desist from "Misbranding fur products by: 1. Failing to affix labels to fur products showing: * * *" followed by a particularization, in language similar to the statute's, of each of the six categories of information required by section 4(2) of the Act.

SUMMARY OF ARGUMENT

I

A. The Court of Appeals properly held that the sale slip given by a retailer to a consumer upon the purchase of a fur garment is not an "invoice" as that term is defined in the Fur Act. The definition limits the term to statements given, in connection with commercial dealings in fur products or furs, to persons who are engaged in dealing commercially therein.

The holding of the Court below is not contrary to the purpose of the Fur Act. The definition of invoice demonstrates a purpose to apply the invoicing provisions to the area of commercial dealings in fur products. The total purpose of the Act is to protect consumers and others against such practices as may be appropriate to their respective needs.

To fall within the statute's requirements, an invoice must be one given to a "purchaser * * * who is dealing commercially in fur products or furs." The clause in the definition, "who is engaged in dealing commercially in fur products or furs," modifies each term in the preceding enumeration of "purchaser, consignee, factor, bailee, correspondent, or agent, or any other person." Similar modifying clauses were so construed in *United States* v.

Standard Brewery, 251 U.S. 210, and in *Porto Rico Railway Company* v. *Mor*, 253 U.S. 345.

This construction of the definition does not in any way impair the full effectiveness of the Fur Act. The Act requires that furs be accompanied by statutory invoices from their origin in commerce down to the point of manufacture of the pelts into fur garments. Fur products are then to be accompanied by statutory labels from the manufacturer into the hands of the consumer. Fur products are to be accompanied by statutory invoices from the manufacturer to the retailer so that the wholesaler and retailer may be certain of the adequacy of the label which they pass along.

To require that, after the consumer has purchased the fur garment under the protection of the statutory label, she must also be given a statutory invoice with the same information, would be a useless duplication.

B. The Court of Appeals held that the statutory definition of invoice was plain and unambiguous, and that reference to the legislative history of the Fur Act was not necessary. If reference thereto be deemed desirable, it will be found that the legislative history squarely supports the construction applied by the Court of Appeals. In its earliest form this legislation required labeling of imported furs and labeling of fur products and did not provide for mandatory invoicing. To meet the industry objection of unworkability, and in conformity with the recommendation of the witness from the Federal Trade Commission, the scheme of the Act was revised to put its emphasis on labeling fur products from the manufacturer into the hands of the consumer, with the accuracy of that disclosure reinforced by invoicing. The legislative history gives no indication that Congress intended to require a statutory invoice from the retailer to the consumer.

C. This litigation is the first square challenge to the Commission's "administrative construction" of the Fur

Act's invoicing provisions. It cannot be said that that construction is long and consistent. The Act became effective only in August 1952. Moreover, during Congressional consideration of this legislation the Commission's expressed comment was that the law would require labeling of fur products and invoicing of furs, and there was no suggestion of its present enlarged view of the invoicing requirements.

D. The retailer's sale of a fur product to a consumer is a local transaction, not in interstate commerce. To subject that sale to the Fur Act's invoicing requirements would not be a valid exercise of Federal power. *Schechter Corporation* v. *United States*, 295 U.S. 495.

The case of *United States* v. *Sullivan*, 332 U.S. 689, upheld a requirement that branding of an article, established while the article was in interstate commerce, might not be undone in an ensuing intrastate transaction. That doctrine does not support a requirement that there be a new, affirmative action taken with respect to an intrastate transaction merely because the subject article has previously been in interstate commerce.

II

The Fur Act requires disclosure of six items of information on the label which must be attached to a fur product. The Commission found that respondent had violated the Act by omissions of three of those items of information, but that there was no evidence of omission of the other three. Nevertheless it proscribed the omission of all six requirements, separately enumerating each one in its order. The Court of Appeals said that it could not affirm an order requiring respondent to cease and desist from doing that which the Commission found it did not do. It modified the Commission's order accordingly.

Respondent objects to the proscription of violations of which it was acquitted. A cease and desist order carries

the definite implication that the violations which it prohibits are violations which have occurred. It would be injurious to respondent's business if a Commission order caused the public to believe, contrary to the fact, that the store had sold garments containing used fur or inferior parts of fur and had concealed it. There is nothing to show any threat that the violations of which respondent was acquitted might be expected to occur in the future.

The holding of the Court of Appeals does not limit the Commission to proscribing the precise violations found by it, but goes only so far as to forbid proscribing violations of which the Commission has concurrently acquitted the respondent. This result will not impede the Commission in any proper function.

ARGUMENT

I. THE SALE SLIP FROM A RETAILER TO THE CONSUMER UPON THE PURCHASE OF A FUR GARMENT IS NOT SUBJECT TO THE INVOICING REQUIREMENTS OF THE FUR ACT; IT IS NOT AN "INVOICE" AS THAT TERM IS DEFINED IN THE ACT.

The Fur Products Labeling Act lays down certain requirements with respect to the giving of invoices upon the sale of fur products. The term "invoice" as used in the Act is narrowly defined therein.

The Commission held that the sale slips which Mandel Brothers gave to customers upon the retail sales of fur garments were invoices within the Act and that they did not conform to the Act's requirements for invoices.

The Court of Appeals for the Seventh Circuit decided that such a sale slip is not an invoice as that term is defined in the Fur Act, and struck down the Commission's order insofar as it applied to invoicing requirements.

We believe that the holding of the Court of Appeals is clearly right, that its interpretation is squarely in accord with the legislative history of the Act, and that no contrary

administrative construction can override the plain language of the Act and the plain purport of its history.

A. The statutory definition of "invoice" excludes invoicing from a retailer to the consumer, since the consumer is not "engaged in dealing commercially."

The Fur Act, in its section of definitions, provides:

> Sec. 2. As used in this Act—
>
> * * * * *
>
> (f) The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs.

The Court of Appeals for the Seventh Circuit held that an invoice as defined by the statute is "clearly not a sales slip at the retailer-consumer level"; a customer purchasing from a retailer is not "engaged in dealing commercially in fur products." That court found no room for doubt, but declared the Act's definition of invoice to be "plain and unambiguous." It aptly said (R. 70-71):

> * * * However, when the statute says purchasers or any *other* person who is so engaged [in dealing commercially in fur products or furs] the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs.

We submit that no other reading of the definition would be proper. The very presence of the definition in the Act indicates an intent to put bounds on the Act's requirement that an invoice be given. The language of the definition emphatically narrows that requirement to the area of

"commercial dealing"—and to the area of such dealing between parties who are "engaged in dealing commercially." The ultimate consumer is not so engaged.

That clear language of the definition is wholly consonant with the Act's purpose to protect the consumer from deception in her purchase of fur products. The design of the Act is to insure that complete and correct information is available to her at the point of purchase—it requires that the garment carry a fully detailed label.

The retail purchaser's protection is the label on the fur product. She has the garment before her, she has had an opportunity to see the label, and she has decided upon the purchase—all before the sale slip is prepared. The sale has been agreed upon and the transaction is concluded. The sale slip can add nothing to her knowledge of the garment; its only function for her will be in connection with paying the bill.

On the other hand, a useful purpose may be served by application of the invoicing requirements to the chain of transactions whereby the goods come to the retailer. With the required information before him on the invoice, the retailer is in a position to see that a proper label is affixed to the garment.

We submit, therefore, that the Act's definition of invoice does not include the sale slip which may be given at the time of the purchase to the ultimate consumer.

Petitioner's brief argues that the interpretation which the Court of Appeals gave to the definition is contrary to the purpose of the Act. Petitioner would have a postulated purpose override the language of the Act, instead of deriving the purpose from the language. The purpose of a statute is to be learned from what the statute provides, and this Act's definition of invoice is part of what must be weighed in determining the Act's purpose.

Petitioner points to the title of the Act as fixing its purpose. The title is: "An Act to protect consumers and others against misbranding, false advertising, and false invoicing of fur products and furs." Any title is necessarily general, and recourse must be had to the law itself to see what ends are to be accomplished and how; only in the law are the purpose and the means adequately disclosed.

Moreover, whatever weight may be given to the title of this Act, petitioner is on unsure ground when he spells out of it a purpose to protect consumers against false invoicing of fur products. To distill that purpose, he must read the title as declaring a purpose to protect each of the Act's beneficiaries against each of the three forbidden practices both as to furs and as to fur products. That proves too much. Reading the title in the manner petitioner would have, we would also find it declaring a purpose to protect consumers against misbranding of furs. But there is no such purpose, because the consumer is concerned with fur products not with furs; and the Act does not require that furs be branded, i.e., labeled. Again, if the word "others" in the title has any significance whatever, it must mean others who are concerned with the handling of furs and fur products. Petitioner's mode of reading the title, accordingly, would have the title show a purpose to protect the dealer in raw furs or the processor of furs against misbranding of fur products and furs. No one will contend that the Act does any such thing; furs are not branded, and the fur dealer is not concerned with fur products. It follows that the most we can get out of the title is a declared purpose to protect consumers and others against such of various practices as may be appropriate to their respective interests. Only in the terms of the Act will we find who is protected against what.

Petitioner's brief contends that the Court of Appeals disregarded the purpose of the Act as reflected in its legis-

lative history. But the court below said that the language of this statute is "clear and unambiguous," making it inappropriate to refer to the legislative history. It cited the decision in *Railroad Commission of Wisconsin* v. *C.B.&Q.R.Co.*, 257 U.S. 563, 589, where this Court said:

> • • • Committee reports and explanatory statements of members in charge made in presenting a bill for passage have been held to be a legitimate aid to the interpretation of a statute where its language is doubtful or obscure. (Citing cases.) But when taking the act as a whole, the effect of the language used is clear to the court, extraneous aid like this can not control the interpretation. (Citing cases.) Such aids are only admissible to solve doubt and not to create it."

The legislative history of this Act is discussed fully in another section of this brief (*infra*, pp. 18-31). If reference to that history be deemed necessary, it will be found to demonstrate an intent and purpose in complete harmony with the interpretation which the court below gave to "invoice." There will not be discovered in the legislative history any intention to require that fur products be invoiced to the ultimate consumer.

In its argument that the court below ignored the purpose of the Act, petitioner's brief (p. 14) quotes fragmentarily from *Black* v. *Magnolia Liquor Co.*, 355 U.S. 24, *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, and *United States* v. *Bramblett*, 348 U.S. 503. Those cases did not involve the question which we have here. As for their approach to the general problem of statutory construction, we observe that the *Florida Citrus* case says, at page 166:

> Here again, in our construction of this explicit Act, we must be sensitive to what Congress has written, and recall that "It is for us to ascertain—neither to add nor to subtract, neither to delete nor to distort."

Applying theoretical rules of statutory construction, petitioner's brief argues (p. 15) that the clause in the

definition of invoice, "who is engaged in dealing commercially in fur products or furs," applies only to "any other person" and does not apply to "purchaser, consignee, [etc.]." In support of the so-called rule of the "last antecedent," the brief cites (*inter alia*) 2 Sutherland, *Statutory Construction*, 448-449, 3d Ed., 1943. That work, at the point cited, goes on to say of the rule:

> But where the sense of the entire act requires that the qualifying words apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent. Thus it is apparent that *the rule* relating to relative or referential terms *is of no great force* and will be applied only when its application is consistent with the legislative intention. (Emphasis added.)

The inconsistency and inapplicability of such a theory of construction is apparent from an analysis of the very definition which is under examination. There are other limiting clauses in the definition of invoice. They say "which is issued in connection with any commercial dealing" and "[which] describes the particulars." They follow the words "written account, memorandum, list, or catalog." On petitioner's theory of statutory construction, those clauses would "be restrained to the last antecedent," which is the word "catalog." Any such interpretation would of course be rejected as contrary to common sense. But it would be most peculiar if, within the bounds of a single sentence, two limiting clauses were held to apply to all of their antecedents and one to apply only to its last antecedent.

In *United States* v. *Standard Brewery*, 251 U.S. 210, this Court construed a statutory provision the structure of which closely resembles the structure of the Fur Act's definition of invoice, and held that the limiting clause applied to all its antecedents. That case involved a statute forbidding the use of "grains, cereals, fruit, or other food

product * * * in the manufacture or production of beer, wine, or other intoxicating malt or vinous liquor for beverage purposes." The defendants were engaged in making non-intoxicating beer and were indicted under the statute. The indictment was quashed by the district court and the Supreme Court affirmed, rejecting the argument that the qualifying clause containing the word "intoxicating" applied only to malt or vinous liquor. The Court held that the qualifying clause containing the word "intoxicating" also applied to the word "beer" and since the defendants were not engaged in the manufacture of intoxicating beer, their conduct did not infringe the statute. The Court said:

> * * * It is elementary that all of the words used in a legislative act are to be given force and meaning (citing cases); and of course the qualifying words "other intoxicating" in this act cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect. The Government insists that the intention was to include beer and wine whether intoxicating or not. If so the use of this phraseology was quite superfluous, and it would have been enough to have written the act without the qualifying words. (p. 218)

In the course of his opinion in *Standard Brewery*, Mr. Justice Day quoted from Lord Bramwell in a House of Lords case as follows (at 218):

> As a matter of ordinary construction, where several words are followed by a general expression as here, which is as much applicable to the first and other words as to the last, that expression is not limited to the last, but applies to all.

To similar effect is the holding in *Porto Rico Railway Company* v. *Mor*, 253 U.S. 345. That case involved construction of a statute which conferred jurisdiction on a federal district court in actions "where all of the parties

on either side of the controversy are citizens or subjects of a foreign State or States, or citizens of a State * * * of the United States not domiciled in Porto Rico * * *." Mor, the plaintiff, was a Spanish subject, domiciled in Porto Rico. He contended that the qualifying clause "not domiciled in Porto Rico" only applied to the last antecedent (citizens of a State of the United States) and did not reach back to the "subjects of a foreign State." The Court, however, held otherwise, saying (at 348):

> No reason appears why the clause "not domiciled in Porto Rico" should not be read as applying to the entire phrase "citizens or subjects of a foreign State or States, or citizens of a State * * *." When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.

Petitioner's brief argues at page 14 that the Commission's view of the invoicing provisions should be sustained because that construction "is necessary to carry out the Congressional purpose" demonstrated in the title and the legislative history. The brief contends at page 12 that "carving out such an exemption" would "defeat the congressional declaration of purpose and render the Act ineffective in a major respect."

We have already shown that neither the title nor the legislative history shows the purpose on which the Commission relies. We urge once more that it is doubly erroneous to assume a purpose and then construe so as to implement that assumed purpose. Rather, the statutory provisions under consideration are to be weighed, along with all the rest of the Act, in determining what is the purpose of the law. The purpose which is derived from examination of the whole law will help to throw light on any doubtful portions. In the present case, it is plain that the Act simply does not apply its invoicing require-

ments to the sale slip from the retailer to the consumer and that there is nothing in the entire Act to suggest a contrary purpose.

Petitioner calls this "carving out such an exemption." There is no more reason for calling this result an exemption from invoicing than there is for saying that fur dealers and processors are "exempt" from labeling. In the same vein, the brief at page 22 says that it would be "anomalous" to apply the advertising and labeling requirements to retail transactions and not also require a statutory invoice to the consumer. Is it also anomalous to require that furs be invoiced and not require that they be labeled? The fact is simply that some requirements are imposed at one point and other requirements at another.

There remains the contention that the holding of the Court of Appeals would "render the Act ineffective in a major respect." The brief puts it at page 15 that there would be created "a serious gap in the regulatory scheme."

We earnestly submit that these are groundless alarms.

Viewing the regulatory scheme as a whole, the Act provides complete and adequate coverage of the fur business. Here is what it does:

1. Furs must be accompanied by statutory invoices at each step of delivery or transfer to a person dealing commercially in furs.

2. Fur products must bear statutory labels, from the hands of the manufacturer into the hands of the ultimate consumer; an intervening wholesaler or retailer may remove a label only if he substitutes a new and proper label.

3. Fur products must be accompanied by statutory invoices at each step of delivery or transfer to a person dealing commercially in fur products.

This means that furs have identifying statutory invoices from their entry into commerce down into the hands of the manufacturer. When the furs, thus identified, are made into a fur product, the manufacturer must attach a statutory label to the garment. Subsections 3(d) and (e) of the Act specify that that label must remain on the product until delivery to the ultimate consumer, except that an intervening wholesaler or retailer may substitute a new label which conforms to the statutory specifications.

Thus, each person in the sequence, from the dealer in raw skins down to the purchaser of the finished garment, has his protection in the form of a statutory invoice or a statutory label. The wholesaler or retailer has, in addition to the label on the fur product, an invoice of the fur product; this enables him to make certain that the garment bears a proper and adequate label. The end result is the garment delivered to the consumer with a label meeting the requirements of the statute.

There is no gap. There is no point at which the Act does not apply effectively.

Petitioner's brief at page 22 suggests that the Act must be viewed as requiring a statutory invoice from the retailer to the consumer because "an invoice is such an important element in effectively protecting retail purchasers." But the whole scheme of the Act is to protect by requiring true disclosure of pertinent facts, and an invoice discloses nothing that is not disclosed by the label. The consumer never sees the bill until after the purchase has been made. She may have seen the advertising; the statute requires that it have stated certain facts. She examines the garment; it is required to bear a label setting forth the facts. It is only after she has decided and has purchased that the bill is prepared. To require that she have a statutory invoice setting forth the same facts as are on the label would be merely cumulative. No one can say that a consumer is more likely or is less likely to keep

a bill than she is to keep a label. And it verges on the ridiculous to say that Federal law should require giving the consumer the same information on each of two pieces of paper because she is likely to lose one piece.

But the brief at page 26 quotes the Commission to the effect that an invoice to the consumer "may serve as a documentary link connecting the sale of specific fur products back through the retailer's records with advertisements therefor."

The expectation of achieving any end in the administration of the Act by so "connecting" is altogether unrealistic.

Ignoring the fact that the label would serve the purpose just as well as the invoice, let us assume that an invoice for a fur coat does enable the Commission to link the sale of that coat back through the retailer's records with advertisements for that coat. What has been accomplished thereby?

The advertising is not thereby rendered any more accessible to the Commission than it otherwise was. The representations in the advertising may or may not be in conformity with the Act's requirements; if they are not, there is a violation quite irrespective of what has been said on the invoice. If the representations on the invoice do not comply, there is a violation regardless of what the advertising says.

Whether the representations in the invoice are the same as the representations in the advertising is not an issue on which the Act bears. If there is a discrepancy between the representations in the advertising and in the invoice, that fact would give rise only to a controversy between the customer and the retailer. Such a controversy is a matter solely for local law, and is not anything with which the Commission is authorized to concern itself.

In short, to provide for a statutory invoice from the retailer to the consumer would be a useless duplication, and the Act does not require it.

The holding by the Court of Appeals gives complete scope and effect to all of the Act; it gives full weight to each of the specifications in the definition of invoice, and to all the requirements of invoices as so defined in the law. The Act is fully operative and fully effective over the entire range of its objectives. We submit that the decision of the court below should be affirmed.

B. The legislative history of the Fur Products Labeling Act squarely supports the interpretation of the court below, that a sale slip at the retailer-consumer level is not an invoice within the Act.

In holding that the sale slip given by a retailer to the ultimate consumer is not an invoice within the Act, the Court of Appeals declared the statutory definition of "invoice" to be plain and unambiguous. Accordingly, it found no occasion for recourse to the legislative history of the Act. However, if any doubt be asserted as to the meaning of the definition, that history makes it abundantly clear that the interpretation of the Court of Appeals is correct.

The Fur Products Labeling Act is the result of legislative consideration and action extending over several years, during the 80th, 81st and 82nd Congresses. The definition of invoice in section 2(f) of the Act is exactly the same as the definition of that term in section 2(e) of H.R. 3734 as reported out of committee in the 80th Congress, and exactly the same as section 2(e) of S. 2703 as introduced in the 80th Congress. The mandatory invoicing provisions of the present law are substantially the same as the invoicing provisions of the bills just mentioned, differing only in the specification of what must be shown on the invoice.

Once formulated as above set forth, these two features—the definition of invoice and the mandatory invoicing provisions—were unchanged as the legislation went through intervening bills and consideration to become the present law.

Accordingly, clear indication of Congressional intent is to be found in what was said and done when these two features first came into the legislation.

In the 80th Congress, H.R. 3734 was introduced by Representative O'Hara on June 5, 1947. A companion bill in the Senate, S. 1388, introduced the same day by Senators Johnson and McCarthy, was substantially identical. They were strictly labeling bills. Those bills contained no definition of the term invoice. They specified that certain representations would be deemed false invoicing, but they did not require the giving of any invoice (except Customs invoices on imports). The bills required the labeling of fur articles beginning with manufacture or introduction into commerce of such fur articles, the labels to remain until sold to the consumer. Most drastic, those bills required the labeling of each skin of any imported fur before its release from Customs, and demanded that the same label be put back on each such skin after each step in its processing until such imported fur was manufactured into a garment.

At the hearings on H.R. 3734, April 6 and 7, 1948, the only witnesses favoring the legislation were Henry Miller, Director of the Bureau of Trade Practice Conferences and Wool Act Administration of the Federal Trade Commission, and two representatives of the National Board of Fur Farm Organizations. The fur farmers complained of the use of fanciful designations in naming furs, for example, "mink-blended muskrat", to designate muskrat fur dyed to resemble mink. They claimed that consumers were deceived.

No consumer witnesses appeared.

The witnesses from the fur industry were dealers in skins and processors and manufacturers. They objected that the bill would subject imported furs to such impossible burdens as to prevent the importation of most raw furs, and thus would give a monopoly to the domestic fur farmers. They declared that it would be physically impossible to open and repack the bales of imported furs at Customs, put a tag on each skin, and maintain that tagging all through the complicated processes of dressing raw skins and dyeing them. They did not discuss the bill's scant invoicing provisions.

Petitioner's brief at page 17 says that "industry spokesmen almost unanimously endorsed legislation requiring full disclosure on retail invoices as the simplest and most effective way to protect consumers from deceptive practices." At pages 18-19 the brief sets out a medley of words and phrases from their testimony at the hearings on H.R. 3734. Whatever the proposals of those witnesses may be worth, these references to them produce a badly distorted view of what occurred. If we must estimate what weight the legislators may have given to the witnesses, we must look at their testimony in its context.

All of those witnesses were appearing in bitter opposition to any legislation at all. As one of them said, "We came down here faced with a bill which, to us, looked very vicious, and we came here to oppose it and to oppose it very violently." (Hearing before the House Committee on Interstate and Foreign Commerce, 80th Congress, on H.R. 3734, p. 86.)

Those witnesses did not have before them a bill which required invoicing. It was a labeling bill. They complained that the labeling requirements were ruinous and would be of no benefit to anyone; they contended that the

Commission could accomplish all needful ends under its existing authority. (*id.*, pp. 64, 80, 97-102, 124-127, 147, 151, 162, 170, 177.)

It is obvious from their testimony that, in suggesting the remedy of invoices to the consumer, they were desperately advancing any alternative that might save them from the burden of maintaining labels on imported skins during the various processing steps.

One of those witnesses (Benedek, from whom petitioner quotes) said, "* * * I am heartily in favor of requiring a disclosure on the invoice with the sale of the garment describing everything that we know about it, the name of the animal and the origin of the fur, if we have it, and anything else which will be helpful to the consumer." (*id.*, p. 154.) But on the next page he said, with respect to giving the same information on a label, "It must be perfectly obvious that the label is of no value whatever to the consumer insofar as it discloses the name of the animal which produced the fur, even though that name has never been associated with the fur, or the place where the animal was born." Later, he said, "* * * I see infinite possibilities for harm in the label, and on the other hand a great possibility for benefit to the consumer in requiring a complete disclosure of the name and origin of the fur in the invoice * * *." And, "I would say that the label would be of such little benefit to the consumer; and would be a possibility for detriment to the consumer, that I would much sooner that you provide that we must render him an invoice truthfully describing his purchase." (*id.*, p. 157.)

Another witness (Weber, to whom petitioner refers) was even more frank about his motives, saying, "We endorse the suggestion that that affirmative disclosure be made in the form of invoices in preference to tagging, because the invoicing would obviate the necessity of the

burdensome accounting and record-keeping practice that would be placed upon the jobber." (*id.*, p. 168.)

It was in response to the testimony of those witnesses that Mr. Miller, from the Federal Trade Commission, was called back to the stand by Congressman O'Hara, the sponsor of the bill. (Hearing before the House Committee on Interstate and Foreign Commerce, 80th Congress, on H.R. 3734, p. 199.) In the course of his discussion, Mr. Miller said, at page 202 of the above hearing:

> Representations have been made here about the invoice. Now, having a good invoice is a help. I feel, however, that it by no means can reach a situation as simply and as effectively as a tag.
>
> An invoice is a thing that takes place after the sale has been consummated. It is locking the barn door after the horse has been stolen, in a way.
>
> A label is prophylactic; it is preventive. The consumer comes in, and she sees a whole rack of coats there. She may be in doubt as to what she wants to buy. Some of them are not in doubt. Some come in there, and they ask for a particular type of coat. When they see the label they are apt to be apprised of the truth at the time.
>
> It is important to them to have the truth before they actually make the contract to purchase.
>
> With all due respect to the fact that a good invoice is a good thing to have, I feel that a good label on the product itself simply giving the truth is a more effective remedy.
>
> It is not an easy thing for a retailer, a retail store, to sit down and execute an invoice for every purchase. A manufacturer sends invoices because he ships in quantity. But a retail store will make many sales during the day, and it would be rather irksome and cumbersome, I think—I fear—if the retail store were required to execute an invoice at every sale at the time of sale.

Someone may say, "They can mail the invoice a little later." That is possible. But there, again, I say the whole thing involves considerable more effort, considerable more machinery, than to have a simple tag on the article itself.

Many of the same witnesses testified similarly at hearings later that month on S. 1388 (the Senate's companion bill) before a subcommittee of the Senate Committee on Interstate and Foreign Commerce. Mr. Miller, from the Federal Trade Commission, was among the witnesses.

In the course of those hearings, Senator McCarthy asked Mr. Miller whether it would be feasible to meet the industry's objections by providing, instead of individual labeling of the pelts up to the manufacturer's level, that it be handled by invoicing. Mr. Miller said:

> Covering the necessary information in an invoice rather than in a label with respect to the raw fur from the time either imported or introduced into the channel of commerce, and trapped in this country, up through the various stages until it becomes a dyed and dressed pelt, and is then produced into a fur coat, for example, up to that point, I think it can be adequately covered, the necessary information by invoice; consequently, dispense with the necessity of attempting to mark the individual pelt.
>
> * * * * *
>
> When the manufacturer converts the thing into a coat, makes, for example, the muskrat coat, a tag or label showing the fur that is in that coat is then to be required on the product, and from there on it remains with the product. It is a finished product and ready for the channels of trade that takes it on to the ultimate consumer in that form.

(Hearings before Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1388, 80th Congress, pp. 160-162.)

Later in the same hearings, at pages 185-186 thereof, there was the following discussion:

> SENATOR MCCARTHY: I think you are talking about two different things. What Mr. Miller proposes is that up to the labeling point you have an invoice for the protection of the men along the way so you can trace it back and find out where and when the deception started.
>
> Once the manufacturer obtains the article, it is then labeled, and *from that point on, you are not concerned with any invoice.*
>
> MR. MILLER: That is right.
>
> SENATOR MCCARTHY: You are merely substituting *invoice prior to manufacturer's level* to make this simpler of enforcement, less expensive.
>
> MR. MILLER: That is true.

(Emphasis added).

Those were the hearings which were to determine the ultimate form of the legislation now under scrutiny. The answer on this invoicing issue in the case at bar depends on which course the legislators then followed. They had heard industry spokesmen object to any legislation at all, bitterly oppose requirements for labeling furs in the pelt form, and advocate invoicing to the consumer as an alternative. They had heard the witness from the Federal Trade Commission suggest invoices for furs up to the point of manufacture so that every one up to that stage would know what he was handling; and labels on manufactured fur articles for the protection of the consumer.

What course did the legislators choose?

The month after the hearings, the House Committee on Interstate and Foreign Commerce reported H.R. 3734 in a form which the report characterized as a "substitute"

bill.* As so revised, the bill was the same in structure and similar in content to what later became the present law. The reported bill required the labeling of fur products and required the invoicing of furs and fur products. It defined the term "invoice" in precisely the same language as now appears in the Act. That original definition was:

> SEC. 2. As used in this Act—
>
> • • • • •
>
> (e) The term "invoice" means a written account, memorandum, list, or catalog, which is issued in connection with any commercial dealing in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a purchaser, consignee, factor, bailee, correspondent, or agent, or any other person who is engaged in dealing commercially in fur products or furs.

The Committee report accompanying the revised bill, submitted by Mr. O'Hara, said:

> The committee substitute is generally modeled after the Wool Products Labeling Act of 1939, and requires mandatory *invoicing of furs* and *labeling of fur products* moving in interstate or foreign commerce to show the true English name of the animal; its country of origin; the fact that the garment contains used fur if such is the case; the fact that the fur is dyed if such is the case, and the fact that the fur product is composed of bits and pieces instead of whole skins if such is the case.
>
> • • • • •
>
> The committee substitute makes it unlawful and declares it an unfair and deceptive act and practice

* The Senate Committee did not report out S. 1388. However, its authors, Senators Johnson and McCarthy, introduced a new bill, S. 2703, which was substantially identical with H.R. 3734 as reported in the House. The new S. 2703 was introduced in the Senate on May 19, 1948; the revised H.R. 3734 was reported in the House on May 20, 1948. The obvious assumption is that both bills were written in the light of the testimony above referred to in the April 1948 hearings before the House Committee and the Senate Subcommittee.

within the meaning of the Federal Trade Commission Act to market in interstate or foreign commerce either *furs* or *fur products* which are not *respectively invoiced and labeled* to show the true English name of the animal, its origin, and other factual information affecting the value of both furs and fur products.

* * * * *

With respect to *furs*, the information required by this legislation is to be passed on by the means of *invoices*. In respect to *fur products, labeling* is required which begins with the manufacturer of the fur product. Removal of the manufacturer's label is forbidden, until the article reaches the ultimate consumer.

(House Report No. 2004, 80th Congress, pp. 2, 3; emphasis added.)

The bills in subsequent Congresses retained the same definition of invoice; they retained the same requirements of labels for fur products and of invoices for furs and fur products. The Committee reports on the subsequent bills set forth the same descriptions of the terms of the bills—"invoicing of furs and labeling of fur products"—as did also the letters of comment from the Federal Trade Commission to the respective committees. (The legislative history of the bills, through the 80th, 81st and 82d Congresses, is described in detail in Appendix A to this brief, wherein will also be found pertinent excerpts from the committee reports and F.T.C. letters.)

The contention on behalf of the Commission is that the law requires that fur products be both invoiced and labeled all the way from the manufacturer into the hands of the consumer. That might be true except for the statutory definition of the term invoice, which says "in connection with any commercial dealing" and "who is engaged in dealing commercially." It will hardly be disputed that the definition evinces clear intent to stop short

at some point. The problem in this litigation is to determine what is that point.

Section 3 and section 5(b) as they originated in the 80th Congress and as they stand in the present Act appear to carry invoicing to some point beyond the manufacturer. We contend that, under the definition of the term invoice, that point is somewhat short of the consumer—who is not dealing commercially.

The testimony of the witness from the Federal Trade Commission doubted the value of invoicing to the consumer; Mr. Miller said a label would give her better protection. He advocated invoicing of furs until they reached the manufacturer, and advocated labeling of products, from the manufacturer into the hands of the consumer. The ensuing legislation defined invoice to include statements given between persons dealing commercially—both the person giving the invoice and the person receiving the invoice. The language of the reports, even if the language be characterized as a "shorthand description" (Commn. Brf., p. 23), unmistakably emphasizes invoicing with respect solely to furs and not products.

The obvious interpretation—and one which is consistent with all of the legislative provisions and with all that is said in the reports—is that the legislation does these things:

(1) It requires invoicing of furs at all stages and into the hands of the manufacturer, so that each processor may be assured of the identity of what he is getting.

(2) It requires labeling of fur products, beginning with the manufacturer and continuing into the hands of the consumer; the invoices will have enabled the manufacturer to identify the constituent furs and to prepare a true and correct label.

(3) It requires invoicing of fur products from the manufacturer into the hands of the retailer.

There is good reason why step number (3) above, which overlaps or parallels the requirement of a label on the fur product, applies as between the manufacturer and the retailer and does not apply as between the retailer and the consumer. Section 3(c) and (d) of H.R. 3734 as reported in the House in the 80th Congress forbade removal of the label until the fur product was delivered to the ultimate consumer, except that "any person dealing commercially with respect to any fur product" could substitute a proper label if he had cause to believe that the label which had come to him was incorrect. Section 3(d) and (e) of the present Act are similar except they provide that a proper label may be substituted on a fur product whether or not the prior label is correct; and proper records of the change must be preserved.

Thus, there is practical reason why the retailer may need an invoice from the manufacturer, in addition to the label on the fur product. If the label does not conform to requirements or is not accurate, the retailer may be liable for passing it on; reference to the invoice may help him make certain that there is a proper label.

On the other hand, there is no reason why the consumer needs a statutory invoice in addition to the label on the fur product. She has no responsibility to pass forward a proper label to any one.

This interpretation gives complete scope and effect to the entire statute—to the statutory provisions for invoicing furs and fur products, and to the statutory definition of invoice. On the other hand, to interpret the statute as requiring an invoice from the retailer to the consumer would deny effect to the definition of invoice.

This interpretation is consonant with the whole philosophy of the Fur Products Labeling Act. The legis-

lation had its inception as purely a labeling law; originally, invoicing was not required. Early in its history the legislation was revised, so as to apply the labeling requirement to fur products only, and to let the identification of fur pelts be handled by invoices. The purpose of the invoice was to pass forward correct identifying information to each successive step or stage, so that eventually a correct identifying label could be attached.

Thus there is no need in the statutory scheme for giving a statutory invoice to the consumer in addition to the statutory label on the fur product. The duplication of requirements serves a useful purpose only in the steps from manufacturer to retailer.

The Act's definition of invoice provides exactly the limitation on invoicing requirements which we have described. The statutorily-required invoice is one which is given "in connection with any commercial dealing" describing fur products or furs delivered "to a purchaser * * * or any other person who is engaged in dealing commercially in fur products or furs."

Petitioner's brief at page 22 says that there is not "'any substantial contrary indication in the legislative history' * * *' that retail invoicing is exempt from the Act's disclosure requirements." (Presumably its citation of *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, at this point is for the phraseology and not for the assertion; that case does not deal with this Act and does not comment on the legislative history of this Act.) It is not a matter of being "exempt," but is a question of whether the Act requires disclosure on a statutorily-regulated invoice to the consumer, who is already protected by a statutorily-regulated label.

The present inquiry would be better served by examining the legislative history for "substantial indication" that Congress intended to require that the sale slip from

retailer to consumer be subjected to regulation by statute. Petitioner points to no such indication.

Petitioner's brief at pages 20-22 refers to Congressional committee reports which it says show an "intent to give consumers broad protection against unfair and deceptive practices, including false invoicing." Elaborating the assertion, the brief strings together snatches of language from various parts of reports, but even that artificial potpourri does not spell out any declaration of an intention to require statutory invoices from the retailer to the consumer. The most the brief can make out of it is a statement of a purpose to protect consumers and others (or "consumers and scrupulous merchants") against abuses arising from improper advertising, invoicing and labeling. That is substantially a paraphrase of the title of the Act. We have discussed earlier in this brief (*supra*, p. 10) the fallacy of reading that purpose so that each object of the Act's concern is protected against each of improper labeling and improper invoicing and improper advertising of each of furs and fur products. On the contrary, some have one protection, some have another. Each is protected against such practices as his interest may require.

When the committee reports come to discuss how the law implements the stated general purpose, they uniformly and repeatedly describe the law as requiring the labeling of fur products and the invoicing of furs. (House Report No. 2004, 80th Congress, pp. 2, 3; House Report No. 919, 81st Congress, pp. 1, 2, 3; Senate Report No. 2378, 81st Congress, p. 1; House Report No. 546, 82d Congress, pp. 1, 2, 3; Senate Report No. 78, 82d Congress, p. 2. See Appendix A.)

In addition to the dichotomy described in the reports, the Act provides that fur products be invoiced to an extent limited by the definition of "invoice," i.e., to persons dealing commercially in such products. The fact that the reports do not spell out this limited overlap suggests

that it may not have been viewed as of equal importance with the other features. Whatever the reason, it is clear that, if the legislators had intended that fur products be statutorily invoiced all the way into the hands of the consumer, some report at some time would have said label fur products and invoice furs and fur products from the pelt to the consumer. None did. No report even hints that the invoice requirement extends to the retail sale of fur products.

Nor is the Commission's case advanced by its brief's general emphasis of the purpose to protect consumers. Of course consumers were among those to be protected by the legislation. The problem here is to determine how the law protects them. It is our view that consumers are given protection by the statutory label, the accuracy of which is backed up by the requirement to invoice furs and the requirement to invoice fur products and label fur products from the manufacturer to the retailer. As we have pointed out, no useful purpose would be served by duplicating the protection for the consumer, i.e., by requiring an invoice as well as a label. For the consumer, the invoice comes *after* she has made her choice of the fur product. Before the purchase, she has relied on advertising and on the label, and the law protects her in that reliance. We are dealing with what is essentially a disclosure statute, and disclosure after the consumer has purchased would be merely repetitive.

C. The administrative construction of the Act is erroneous in applying to retail sales the provisions with respect to invoices.

The question in this lawsuit is the meaning of the statute's definition of invoice and of its invoicing requirements. The Commission relies on its own administrative construction of the statute as persuasive that that construction is correct.

The brief for the Commission enumerates (and even lists in an appendix) the Fur Products Labeling Act cases in which the Commission has applied its interpretation of the Act's invoicing provisions. No one denies that the Commission has proceeded pursuant to its view that the Act applies to retail sale slips. But now we are litigating the issue of whether the Commission is right. If the Commission has erred, the fact that it has erred in a long list of complaints will not help its case. So far as we can learn, the case at bar is the first one in which a respondent has seriously contested the present issue.*

The Commission's brief, at p. 27, contends that its administrative construction of the Act should not be disturbed because it has been "long and consistently adhered to." But the statute is relatively new. It took effect in August 1952, and there has hardly been time for an administrative construction to achieve a degree of maturity putting it beyond attack.

Nor can it be said that the Commission has been consistent in its view of the statute. As we have shown, the provisions presently in issue first appeared in H.R. 3734 as reported in the 80th Congress. Subsequent to that appearance, the Commission wrote no less than six letters to Congressional committees commenting on what is, so far as concerns the present issue, exactly the law now in effect. Each of those letters — the latest one dated February 16, 1951 — described the statute as requiring "mandatory labeling of fur articles of wearing apparel and invoicing of furs." (Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 97 and H.R. 3755, 81st Congress, pp. 28 and 30;

* Almost all of the Fur Act proceedings instituted by the Commission have been closed by agreed orders. The present case is only the second Fur Act case to be litigated. The first one was *DeGorter* v. *Federal Trade Commission*, 244 F. 2d 270, C.A. 9, which did not present the issues here in controversy.

Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress, p. 6; House Report No. 919, 81st Congress, pp. 5 and 6; Senate Report No. 2378, 81st Congress, p. 5; House Report No. 546, 82d Congress, p. 5; Senate Report No. 78, 82d Congress, p. 5,) And that is precisely the pattern which had been advocated by Henry Miller* in testifying on H.R. 3734 and S. 1388 in the 80th Congress.

The question now is whether the Commission is correct in its subsequent view that the statute provides mandatory labeling of fur articles, and invoicing of furs and of fur articles into the hands of the consumer. We believe that the discussion in the preceding pages of this brief shows that the Act does not require a statutory invoice to the consumer on her purchase of a fur article.

Petitioner's brief at pages 26-27 repeats its earlier arguments that the consumer needs both the statutory label and the statutory invoice. Under the Act, each one of them must show the same information.

And the brief repeats the argument that the invoice is a necessary connecting link to enable the Commission to trace back to the advertising. Apparently the theory is that the label will not serve that purpose, although its information is the same as that on the invoice.

We have answered those contentions (*supra*, pp. 16-17), pointing out that the sale slip comes after the consumer has made her choice of a fur product, in reliance on the label; that there is no basis for any assumption that she will keep the sale slip rather than the label; and that it is absurd to say that Federal law requires giving her information in duplicate in order to avoid the danger that

* At the time he so testified, Mr. Miller was Director of Trade Practice Conferences and Wool Act Administration of the Federal Trade Commission. When he testified at hearings on the legislation in 1951, he was identified as Assistant General Counsel of the Commission.

she may lose one copy. We have shown that the absence of an invoice to the consumer will not inhibit any Commission activity, and that the presence of such an invoice will not enable the Commission to do anything that it could not do without the invoice.

At page 27 petitioner's brief argues that "the declared will of the legislative body could not be carried out" in the absence of a technical invoice to the consumer. This begs the question. We are litigating whether it is the "declared will" that the consumer have a statutorily regulated invoice. And we have amply shown that the "declared will" to protect consumers can be carried out and is carried out with the system of disclosure requirements culminating in a statutory label to guide the consumer's choice.

D. Under the Constitution, the Fur Act's invoicing requirements may not validly be imposed on the local sale of a fur product by the retailer to the consumer.

To read the Fur Act as requiring that the retailer prepare and give a statutory invoice upon the sale of a fur product to the consumer would give rise to the question of whether the Act in that respect is a valid exercise of Federal power.

At the time of such sale any interstate transactions have terminated, even though the component furs or the fur product itself may have previously moved in commerce under the Act. The sale in the department store is not in commerce. (See *Federal Trade Commission* v. *Bunte Brothers*, 312 U.S. 349.)

Under the holding of this Court in *Schechter Corporation* v. *United States*, 295 U.S. 495, the invoicing requirements may not be imposed on this strictly local transaction.

Nor may invoicing in connection with the intrastate transaction be sustained under the doctrine of *United*

States v. *Sullivan*, 332 U.S. 689. In that case the applicable statute required that the drug be branded or labeled while in interstate commerce and forbade the doing of any act, while the drug was held for sale after shipment in interstate commerce, which would result in its being misbranded. Thus, in addition to the labeling in commerce, the statute forbade the undoing (even in an intrastate transaction) of what had been so required and done. It demanded the maintaining of a condition which had validly originated.

Turning to the Fur Act, there may be found an analogy to the *Sullivan* case in the requirement that fur products be labeled and that the labeling be maintained until the products reach the consumer. And there is further similarity in the Fur Act's provision that a label may be removed only if it is replaced with a new label which conforms to the requirements.

But the analogy stops with labeling. Under the proposed application of the Fur Act, the retailer would have to prepare and give an invoice. This is an independent step; it is in addition to, not in perpetuation of, what has been required as the garment moved in commerce subject to regulation. (Obviously, the retailer does not pass along to the consumer the invoice on which he had purchased the garment.) The requirement would be, not that the retailer refrain from thwarting what has been done under the authority over interstate commerce, but that he take an affirmative step in a local transaction.

We submit that that independent, affirmative action may not be required in a local, intrastate transaction merely because similar action has been required in earlier interstate transactions. And we suggest that it may well be that the foregoing considerations contributed to Congress' decision not to require an invoice on the retail sale of fur products.

II. THE COURT OF APPEALS PROPERLY HELD THAT THE COMMISSION'S ORDER COULD NOT REQUIRE RESPONDENT TO CEASE AND DESIST FROM DOING THAT WHICH THE COMMISSION HAD FOUND RESPONDENT DID NOT DO.

Section 4(2) of the Fur Act specifies six items which must appear on the label on a fur product:

(A) the animal name, in conformity with the Fur Guide;

(B) that the product contains used fur, when such is the fact;

(C) that the fur is dyed, when such is the fact;

(D) that the product contains inferior parts of fur, when such is the fact;

(E) the name or registered number of the manufacturer or vendor;

(F) the country of origin of imported fur.

The Commission found that there was no evidence that respondent had violated the Act by omitting disclosure of the presence of used fur or inferior parts of fur or omitting the name of the vendor (items (B), (D) and (E) of the requirements). Yet it enjoined the omission of all six requirements, separately enumerating each one.

Respondent objected to the prohibition of violations of which it had been acquitted, not because it expects to commit those violations but because any prohibition in a cease and desist order inevitably means to the public that the prohibited violation has been committed. It is of major importance to Mandel Brothers that no order suggest that the store has sold garments containing used fur or inferior parts of fur and has concealed the fact.

The Court of Appeals rejected so much of the Commission's order as directed respondent to cease omitting from labels the items which the Commission found had not been omitted.

The basis of petitioner's attack on that holding is the ief's premise (pp. 2, 28) that the ruling of the Court of ppeals "limits the Commission to proscribing the precise beling violations which it finds."

The court below did not so hold. In its opinion, the ourt of Appeals said (R. 69-70):

> • • • We find no difficulty in subscribing to the doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do.

The court explicitly recognized that Commission orders do not have to be limited to the particular violations found to have been committed. The only limitation imposed by the court below is a narrow one—consonant with every fundamental of our jurisprudence—that the Commission may not enjoin one from doing what it has found one did not do. No legitimate scope of Commission orders is inhibited.

The Court of Appeals did not deny to the Commission its "wide discretion" in remedying unlawful practices disclosed in its proceedings; it did not limit the Commission "to prohibiting the illegal practice in the precise form in which it is found to have existed." It held merely that, where the unlawful or illegal practice was found not to have existed, the Commission could not enjoin it.

The brief cites decisions declaring a wide discretion in the Commission's choice of a remedy, and a power to restrain "other like or related unlawful acts." But it points to no decision upholding an administrative or judicial order where those like or related acts were found not to have been committed and were nevertheless enjoined.

Moreover, in some of the very cases cited for their general enunciation of the powers of an administrative tribunal, the final result was a finding that the tribunal's order was too broad even under those general principles. In *Nationdl Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426, and in *May Department Stores* v. *National Labor Relations Board*, 326 U.S. 376, the ultimate result was a narrowing of the Board's orders. And in *Jacob Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, there was a remand so that the Commission could consider whether a more limited order might suffice.

In view of the serious nature of two of the violations of which respondent was acquitted, and the obvious damage to good will of a suggestion that they had occurred, it was perhaps an abuse of discretion for the Commission to enjoin them. In *Siegel Company, supra,* this Court held that the Commission should have considered whether some change in the name or some qualifying language would have been sufficient to satisfy the law and still not destroy Siegel's "Alpacuna" trade name. A store's good will is as much a property right as is a trade name. A similar solicitude for property rights in the present case would demand considering whether the Commission's order must stigmatize respondent by suggesting, contrary to the fact, that the store had sold garments containing used fur or inferior parts of fur and had failed to disclose it.

Petitioner argues at page 30 that expected violations may be enjoined along with violations which have occurred, and that a retailer who has omitted some categories of information on labels may be expected to omit others. The Commission did not justify its order with any such forecast and made no finding which would support it. Of course the Act equally requires each of the six categories of information, but that is not to say that the omission of one is just as injurious as is the omission of another. It is common knowledge that many furs are dyed and that

many garments contain imported furs; failure to show those facts on a label is not as intrinsically reprehensible as would be failure to disclose the presence of used or inferior fur. The occurrence of violations of a less serious quality affords no basis for sound expectation that there will occur other violations of a truly serious nature. Moreover, a respondent who is under an order to label properly, with specific enumeration of the three items wherein he has been found delinquent, is hardly likely to risk further proceedings by violating the other three categories in which he has once been found not remiss.

Petitioner's brief argues at pages 30-31 that further and enlarged violations are to be expected because Commission investigations in Mandel Brothers store disclosed violations in September 1952 and violations in October 1954. There is nothing to warrant the accusation of obduracy. Warning and instruction after the first inspection might have been helpful. But the record shows that there was no such communication after either of the investigator's visits. (See Appendix B, *infra.*) Moreover, the testimony shows that there were fewer errors in 1954 than there were in 1952. (R. 49-55)

From whatever standpoint, there is simply no justification for the Commission's proscription of labeling violations of which it had acquitted respondent, and the Court of Appeals properly narrowed the scope of the order.

The brief argues at page 30 that the various categories of information do not give rise to separate offenses, that misbranding is a single offense. The Commission's final order did not so treat the matter, but specified each category in detail. But even if the view be accepted that the violation is composite, that it is the failure of the label to set forth each element required by the statute, the same considerations as above set forth are still applicable.

The order of the Commission was not that respondent cease and desist from "misbranding fur products by failing to affix labels to fur products showing each element of information required by the Act." The order went further, and enumerated in detail each statutory element of information. We submit that, if the Commission chooses to command obedience to the statute by reciting in particular each statutory element, it may not include in that particularization the elements with respect to which it had specifically found no violation.

The brief argues at pages 33-34 that under the decision below the Commission would have to bring new proceedings to deal with subsequent violations not theretofore resorted to. But the advantage of avoiding "multiplicity of actions" cannot warrant the enjoining of violations at large, and *a fortiori* cannot warrant enjoining violations which were found not to have occurred. As this Court said in *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426, 433, 437:

> It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> * * * * *
>
> We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.

Finally, it is quite impossible to see how the Court of Appeals decision on this point would impede the Commission in any proper function. The way is still open for prohibiting whatever illegal activities may have been dis-

closed, together with related variations on those activities. The only "fencing in" of the Commission is that it may not specifically require one "to cease and desist from doing that which the Commission specifically found it did not do."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

The following material traces the legislative history of the invoicing provisions of the Fur Products Labeling Act and of the definition of "invoice" in section 2(f) of that Act.

80TH CONGRESS

H.R. 3734, as introduced by Representive O'Hara in the 80th Congress, required that each skin of any imported fur be labeled before its release from Customs; that the same label be put back on each such imported skin after each step in its processing; and that the label remain on each such skin until it was manufactured into a garment. It required the labeling of fur articles, beginning with the manufacture or introduction into commerce of such fur article, the labels to remain until the article was sold to the consumer. The bill contained no definition of the term "invoice." It specified certain representations which would be deemed false in invoicing, but did not require the giving of any invoice (except Customs invoices on imports).

S. 1388, as introduced in the 80th Congress by Senators Johnson and McCarthy, was substantially the same as H.R. 3734.

In the hearings on H.R. 3734 before the House Committee on Interstate and Foreign Commerce (April 6 and 7, 1948) representatives of fur buyers, processors and manufacturers bitterly opposed any legislation. They complained that it would be impossible to maintain the required labeling on each imported pelt all the way through the complicated processes of dressing raw skins and dyeing them. They did not discuss the bill's scant invoicing provisions. Some of those witnesses, apparently as an alternative to the proposed scheme, suggested that disclosure of proper information might be effectuated by requiring an invoice from the retailer to the consumer.

Later in the hearings there was testimony by Henry Miller, Director of the Bureau of Trade Practice Confer-

ences and Wool Act Administration of the Federal Trade Commission, as follows:

> Representations have been made here about the invoice. Now, having a good invoice is a help. I feel, however, that it by no means can reach a situation as simply and as effectively as a tag.
>
> An invoice is a thing that takes place after the sale has been consummated. It is locking the barn door after the horse has been stolen, in a way.
>
> A label is prophylactic; it is preventive. The consumer comes in, and she sees a whole rack of coats there. She may be in doubt as to what she wants to buy. Some of them are not in doubt. Some come in there, and they ask for a particular type of coat. When they see the label they are apt to be apprised of the truth at the time.
>
> It is important to them to have the truth before they actually make the contract to purchase.
>
> With all due respect to the fact that a good invoice is a good thing to have, I feel that a good label on the product itself simply giving the truth is a more effective remedy.
>
> It is not an easy thing for a retailer, a retail store, to sit down and execute an invoice for every purchase. A manufacturer sends invoices because he ships in quantity. But a retail store will make many sales during the day, and it would be rather irksome and cumbersome, I think—I fear—if the retail store were required to execute an invoice at every sale at the time of sale.
>
> Someone may say, "They can mail the invoice a little later." That is possible. But there, again, I say the whole thing involves considerable more effort, considerable more machinery, than to have a simple tag on the article itself.

(House Hearings on H.R. 3734, 80th Congress, p. 202.)

In the hearings on S. 1388 before a subcommittee of the Senate Committee on Interstate and Foreign Commerce,

on April 12 and 28, 1948, Mr. Miller was questioned and testified as follows:

SENATOR MCCARTHY: I do not know whether you were here this morning or not, Mr. Miller, but I had in mind that we might be able to simplify the enforcement of this Act and make it less obnoxious to the trade up to a certain point without defeating the purpose of the Act by providing that instead of the individual labeling of the pelts up to the manufacturer's level, that be handled by invoicing. Do you think that could be done without defeating the purpose of this Act?

MR. MILLER: I do.

Covering the necessary information in an invoice rather than in a label with respect to the raw fur from the time either imported or introduced into the channel of commerce, and trapped in this country, up through the various stages until it becomes a dyed and dressed pelt, and is then produced into a fur coat, for example, up to that point, I think it can be adequately covered, the necessary information by invoice; consequently, dispense with the necessity of attempting to mark the individual pelt.

SENATOR MCCARTHY: It would be easier of administration, I assume, also?

MR. MILLER: I think that can be provided for by having the legislation provide for the invoice to cover the necessary information and, of course, applying the prohibitory provisions to an invoice to prevent false invoicing and misrepresentation.

SENATOR CAPEHART: You are talking about invoice to whom?

MR. MILLER: The invoice of any seller to his customer so long as the fur has not become a finished product.

SENATOR CAPEHART: Let us start with the importing. Do you mean the foreign seller to invoice it in a certain way to the importer?

MR. MILLER: That is true.

SENATOR CAPEHART: And the importer, in turn, invoice in a certain way to the producer or processor?

MR. MILLER: That is correct.

SENATOR CAPEHART: And then the processor invoices in a certain way to the manufacturer?

MR. MILLER: That is right.

SENATOR CAPEHART: And then the manufacturer invoices in a certain way to the wholesaler?

MR. MILLER: That is right.

SENATOR CAPEHART: And the wholesaler invoices in a certain way to the retailer?

MR. MILLER: When you speak of wholesaler and retailer, I assume you are still talking with respect to the unfinished product; that is, the raw fur or the fur that has not yet become a part of a coat.

When the manufacturer converts the thing into a coat, makes, for example, the muskrat coat, a tag or label showing the fur that is in that coat is then to be required to be on the product, and from there on it remains with the product.

It is a finished product and ready for the channels of trade that takes it on to the ultimate consumer in that form.

With respect to invoicing, foreign furs, when they come in just like any other foreign products, are already invoiced under a sworn consular invoice showing the country of origin and character of product. It is shown quite in considerable detail.

That is an invoice required by statute. A copy of it goes to the importer, and it is also used in the Customs entry.

So the person who receives the merchandise in this country from abroad has that information already provided for him under a legally required invoice, and from there on he has the information that will enable him to invoice it to his customer and his customer to the next customer, until it gets into a manufactured article ready to go into the channels of trade for distribution through to the ultimate consumer.

* * * * *

SENATOR CAPEHART: Let me ask you this, Mr. Miller: If you are going to get a law, and I do not know whether you are or not, that requires that every fur piece be labeled by the manufacturer, and that law has teeth in it, and he is subject to prosecution if he mislabels it, then what do you care about this invoicing business in between? You are only interested in the consumer.

MR. MILLER: When an intermediate man acts in good faith in following what he thought he was buying, indicated usually by the invoice, he should be protected against that.

SENATOR CAPEHART: I am not so sure we should worry so much about protecting the wholesaler and manufacturer. If he can not protect himself on the kind of merchandise he buys and quality, I am not so sure we should protect him. We are only interested in the consumer, are we not?

MR. MILLER: I am interested in fair competition and reasonable protection of everybody who is in this continuous chain.

SENATOR CAPEHART: Do you not get that protection if you require the manufacturer to label it? If he is mislabeling it, he is subject to prosecution. Why do you want to go back and burden the industry with rules and regulations up to that point? I do not know anything about the fur business, you know.

SENATOR MCCARTHY: May I interrupt there, Mr. Chairman?

SENATOR CAPEHART: Yes.

SENATOR MCCARTHY: I think you are talking about two different things. What Mr. Miller proposes is that up to the labeling point you have an invoice for the protection of the men along the way so you can trace it back and find out where and when the deception started.

Once the manufacturer obtains the article, it is then labeled, and from that point on, you are not concerned with any invoice.

MR. MILLER: That is right.

SENATOR MCCARTHY: You are merely substituting invoice prior to manufacturer's level to make this simpler of enforcement, less expensive.

MR. MILLER: That is true.

(Senate hearings on S. 1388, 80th Congress, pp. 159-163, 184-186.)

After the hearings, H.R. 3734 was completely revised and there was reported to the House what the report characterized as a "substitute" bill. The reported bill

set forth a definition of invoice which is precisely the same as the definition in the present law. The structure and general features of the reported bill correspond closely to those of the present law, including the provision for invoicing of furs and fur products.

The report accompanying H.R. 3734 contained the following statements:

> The committee substitute is generally modeled after the Wool Products Labeling Act of 1939, and requires mandatory *invoicing of furs* and *labeling of fur products* moving in interstate or foreign commerce to show the true English name of the animal; its country of origin; the fact that the garment contains used fur if such is the case; the fact that the fur is dyed if such is the case, and the fact that the fur product is composed of bits and pieces instead of whole skins if such is the case.
>
> * * * * *
>
> The committee substitute makes it unlawful and declares it an unfair and deceptive act and practice within the meaning of the Federal Trade Commission Act to market in interstate or foreign commerce either *furs* or *fur products* which are not *respectively invoiced and labeled* to show the true English name of the animal, its origin, and other factual information affecting the value of both furs and fur products.
>
> * * * * *
>
> With respect to *furs*, the information required by this legislation is to be passed on by the means of *invoices*. In respect to *fur products*, *labeling* is required which begins with the manufacturer of the fur product. Removal of the manufacturer's label is forbidden until the article reaches the ultimate consumer.

(House Report No. 2004, 80th Congress, pp. 2, 3; emphasis added.)

No further action was taken on H.R. 3734 in the 80th Congress.

The Senate Committee did not report S. 1388. However, the authors of the bill, Senators Johnson and McCarthy, introduced a new bill, S. 2703, which was substantially identical with H.R.3734 as reported in the House. The new S. 2703 was introduced in the Senate on May 19, 1948; the revised H.R. 3734 was reported in the House on May 20, 1948. The obvious assumption is that both bills were written in the light of the testimony above referred to in the April, 1948 hearings before the House Committee and the Senate Subcommittee.

81ST CONGRESS

H.R. 97 and H.R. 3755, in the 81st Congress, were the same as H.R. 3734 as reported, and the same as S. 2703 as introduced, in the 80th Congress. Their definition of invoice is identical with the definition of invoice in existing law; their provisions as to invoice requirements are substantially the same as those in existing law.

In a letter dated February 15, 1949, to Robert Crosser, Chairman, House Committee on Interstate and Foreign Commerce, Lowell B. Mason, Acting Chairman of the Federal Trade Commission, responded to the former's request for comment on H.R. 97. The letter included the following statement:

> The proposed legislation requires mandatory *labeling of fur products* and *invoicing of furs* moving in interstate or foreign commerce to show the true English name of the animal; its country of origin; and, when such is the case, the fact that the garment contains used fur, or that the furs are dyed, or that the fur product is composed of bits and pieces instead of whole skins. It further requires that when fur products or furs are advertised in commerce that such important facts also be truthfully disclosed.

(House Committee Hearings on H.R. 97 and H.R. 3755, 81st Congress, p. 28; emphasis added.)

In a letter to Mr. Crosser dated April 21, 1949, Mr. Mason made the same comment on H.R. 3755 as is above quoted with respect to H.R. 97. (Same Hearings, p. 30.)

The hearings on H.R. 97 and H.R. 3755 include no comment with respect to the definition of invoice.

After the hearings, the House Committee on Interstate and Foreign Commerce reported a "clean" bill, H.R. 5187; it was quite similar to the original bills.

House Report No. 919, 81st Congress, accompanying H.R. 5187, said:

> The bill is generally modeled after the Wool Products Labeling Act of 1939 and requires mandatory *invoicing of furs* and *labeling of fur products* moving in interstate or foreign commerce to show the name of the animal that produced the fur as set forth in the fur products name guide; the fact that the garment contains used fur if such is the case; the fact that the fur is dyed or bleached if such is the case; and the fact that the fur product is composed of paws, tails, bellies or waste fur if such is the case. . . .
>
> . . . . .
>
> The bill makes it unlawful and declares it an unfair and deceptive act and practice within the meaning of the Federal Trade Commission Act to market in interstate or foreign commerce either *furs* or *fur products* which are not *respectively invoiced and labeled* to show the true name of the animal, and other factual information affecting the value of both furs and fur products.
>
> . . . . .
>
> With respect to *furs*, the information required by this legislation is to be passed on by the means of *invoices*. In respect to *fur products*, *labeling* is required which begins with the manufacturer of the fur product. Removal of the required label is forbidden until the article reaches the ultimate consumer. However, a wholesaler or retailer subject to the affirmative disclosure requirements of the act, may substitute his own label for that of the manufacturer.

(House Report 919, 81st Congress, pp. 1, 2, 3; emphasis added.)

H.R. 5187 passed the House. In discussing the bill on the floor of the House, its sponsor, Congressman O'Hara, said:

> The remedy suggested in this bill is the mandatory *invoicing of furs* and the mandatory *labeling of fur products* moving in interstate or foreign commerce, under the usual name of the animal that produced the fur.

(Congressional Record, July 14, 1949, p. 9700; emphasis added.)

Congressman O'Hara testified before a subcommittee of the Committee on Interstate and Foreign Commerce of the Senate, with respect to H.R. 5187. At p. 15 of those hearings he made precisely the same statement as is above quoted from the House debate.

H.R. 5187 was reported in the Senate with relatively minor changes, not material to this case. The features of particular interest in this discussion, the definition of invoice and the requirement of invoicing, were not changed.

The Committee report said:

> • • • The bill requires mandatory *labeling of fur articles* of wearing apparel and *invoicing of furs* moving in interstate or foreign commerce to show the name of the animal that produced the fur, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. • • •

The report quoted a letter dated July 27, 1949, to Senator Johnson, Chairman of the Committee, from Mr. Mason, Acting Chairman of the Federal Trade Commission. That letter made the following comment on H.R. 5187:

> The proposed legislation requires mandatory *labeling of fur articles* of wearing apparel and *invoicing of furs* moving in interstate or foreign commerce to show the name (as set forth in the Fur Products Name Guide) of the animal that produced the fur, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. * * *

(Senate Report No. 2378, 81st Congress, pp. 1, 5; emphasis added.)

H.R. 5187 remained on the Senate calendar at adjournment of the 81st Congress.

82D CONGRESS

In the 82d Congress, Representative O'Hara again introduced his bill—H.R. 2321. It was similar to the bill in the preceding Congress, and was identical in its definition of invoice and in its requirements of invoicing. H.R. 2321 was the subject of hearings before the House Committee on Interstate and Foreign Commerce. The report of the hearings quotes a letter dated February 16, 1951, to Mr. Crosser, Chairman of the Committee, from James M. Mead, Chairman of the Federal Trade Commission. That letter included the following statement:

> The proposed legislation requires mandatory *labeling of fur articles* of wearing apparel and *invoicing of furs* moving in interstate or foreign commerce to show the name (as set forth in the fur products name guide) of the animal that produced the fur, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. * * *

(House Committee Hearings on H.R. 2321, 82d Congress, p. 6; emphasis added.)

Congressman O'Hara stated in the hearings that the bill was designed to protect consumers from the practice of

using false or misleading statements in advertisements, of foreign animal names and glamorous, fictitious names for furs and fur products. He said:

> The remedy suggested in this bill is the mandatory *invoicing of furs* and the mandatory *labeling of fur products* moving in interstate or foreign commerce under the usual name of the animal that produced the fur.

(Same Hearings, pp. 12-13; emphasis added.)

Henry Miller, by then Assistant General Counsel of the Federal Trade Commission, testified on the bill. Among other things he said:

> * * * Consequently, the insistence upon truthful labeling down through the channels of trade to the ultimate consumer will provide a corrective not only with respect to labeling but also with respect to advertising, where the source of evil largely resides.

(Same Hearings, pp. 21-22.)

The Report on H.R. 2321 carries the following statements:

> The bill is generally modeled after the Wool Products Labeling Act of 1939 and requires mandatory *invoicing of furs* and *labeling of fur products* moving in interstate or foreign commerce to show the name of the animal that produced the fur as set forth in the fur products name guide * * *.
>
> The bill makes it unlawful and declares it an unfair and deceptive act and practice within the meaning of the Federal Trade Commission Act to market in interstate or foreign commerce either *furs* or *fur products* which are not *respectively invoiced and labeled* to show the true name of the animal, and other factual information affecting the value of both furs and fur products.
>
> * * * * * *
>
> With respect to *furs*, the information required by this legislation is to be passed on by the means of *in-*

voices. In respect to *fur products, labeling* is required which begins with the manufacturer of the fur product. Removal of the required label is forbidden until the article reaches the ultimate consumer. However, a wholesaler or retailer who sells, advertises, or offers for sale in commerce, or processes for commerce, a fur product, may substitute his own label for that of the manufacturer.

(House Report No. 546, 82d Congress, pp. 1, 2, 3; emphasis added.)

H.R. 2321 passed the House. Meantime the Senate Committee on Interstate and Foreign Commerce had reported a similar bill, S. 508. The Committee Report thereon said:

> • • • The bill requires mandatory *labeling of fur articles* of wearing apparel and *invoicing of furs* moving in interstate or foreign commerce to show the name of the animal that produced the fur, the country of origin, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. • • •

The Report also quoted a letter dated January 23, 1951 to Senator Johnson from Chairman Mead of the Federal Trade Commission saying:

> The proposed legislation requires mandatory *labeling of fur articles* of wearing apparel and *invoicing of furs* moving in interstate or foreign commerce to show the name (as set forth in the Fur Products Name Guide) of the animal that produced the fur, and when such is the case the fact that the garment contained used fur or that the furs are bleached or dyed or that the fur product is composed of inferior pieces such as paws, tails, bellies, or waste fur. • • •

(Senate Report No. 78, 82d Congress, pp. 2, 5; emphasis added.)

The language of S. 508 was substituted in H.R. 2321 in the Senate and thus passed. In conference, a slightly dif-

ferent version was substituted, but still with no change in the provisions which are here pertinent. The Conference Report said:

> Both the House bill and the Senate amendment provided that fur products shall be considered to be misbranded, and that furs or fur products shall be considered to be falsely or deceptively advertised or invoiced, unless certain specified information is shown in the labeling, advertising, or invoice. * * *

(House Report No. 769, 82d Congress, p. 10.)

The Conference Report was approved and the law was enacted.

APPENDIX B

Following are excerpts from the testimony before Hearing Examiner Robert L. Piper in the hearings pursuant to the F.T.C. complaint herein. The page references are to the paging of the original transcript of testimony. (In the stipulation as to printing the record, it was agreed that any party might refer, in its brief or oral argument, to any part of the record filed in this Court which has not been printed. The testimony here set forth is in the certified record but is not printed. This testimony has been cited in the brief, and is here reproduced for convenience of reference.)

(ROBERT CAMENISCH, F.T.C. investigator, testifying upon examination by Mr. Blood, counsel for Mandel Brothers, Inc.)

Q. The Complaint in this case was filed on October 27, I think it was, late in October, of 1955. Was that Complaint prepared by you?

A. No, it wasn't.

Q. Was it submitted to you to examine before it was filed?

A. No.

Q. You had not seen it before it was filed?
A. No.

MR. BLOOD: The reason, your honor, that I am asking is that the matters with respect to labeling which he testified to, most of which are not mentioned in the Complaint, three out of the 8 things he testified regarding, are mentioned in the Complaint; the other 5 are not.

By MR. BLOOD:

Q. After you made your investigation in the fall of 1952 was there any communication so far as your knowledge is concerned made with Mandel Brothers with respect to the matters you had investigated?
A. Not insofar as I had any knowledge of.

* * *

Q. Mr. Camenisch, I asked you a little bit earlier in this examination about whether so far as you knew, any communication was made with Mandel Brothers with respect to the matters you referred to where you said according to your knowledge you didn't know of any, would that be true of 1954 as well as 1952? I think my question was directed before, of 1952; I am not sure. I wanted to be sure the question covered both.
A. I don't know of any. No, I don't know of any communication or any contact that they had.

MR. BLOOD: That is all.

(T. 111-112, 116)

(BERNARD B. BERNSTEIN, witness for Mandel Brothers, Inc., testifying upon examination by MR. BLOOD)

Q. Did Mr. Camenisch communicate with you after these two visits and request you to make any changes with respect to your labeling in the Subway Store?
A. No, sir.

(T. 143)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, *Petitioner,*

v.

MANDEL BROTHERS, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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INDEX

	Page
Questions presented	2
Statement of the case	2
Argument	4
Conclusion	17

CITATIONS

CASES:

DeGorter v. *Federal Trade Commission*, 244 F. 2d 270	12
National Labor Relations Board v. *Express Publishing Company*, 312 U.S. 426	16
Siegel Company v. *Federal Trade Commission*, 327 U.S. 608	14

STATUTES:

Fur Products Labeling Act, 65 Stat. 175, 15 U.S.C. 69 *et seq.*:	
Section 2(f)	4
Section 4(2)	12

MISCELLANEOUS:

Rules and Regulations under the Fur Products Labeling Act, Title 16 C.F.R. 301	3
Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 3734, 80th Congress	8
Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 97 and H.R. 3755, 81st Congress	10
Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress	9, 10
House Report No. 2004, 80th Congress	9
House Report No. 919, 81st Congress	9, 10
House Report No. 546, 82d Congress	9, 10
Senate Report No. 2378, 81st Congress	9, 10
Senate Report No 78, 82d Congress	9, 10

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RESPONDENT'S BRIEF IN OPPOSITION

Mandel Brothers, Inc., submits that the court below did not err in its conclusions on the questions here involved, that its holdings on those issues do not frustrate the purposes of the Fur Products Labeling Act, that there is no question requiring review by this Court, and that the petition for certiorari should be denied.

QUESTIONS PRESENTED

The respondent respectfully suggests that the questions presented in this proceeding may be more accurately stated as:

1. Whether the sale slip given to the consumer upon the purchase of a fur product at retail is within the definition of "invoice" in the Fur Products Labeling Act.

2. Whether the Federal Trade Commission, in issuing cease and desist orders against failure to label fur products properly, may proscribe labeling omissions of which it has concurrently "acquitted" the respondent.

STATEMENT OF THE CASE

The petition's statement of the case appears to be adequate for purposes of this proceeding, except for certain details in the portion dealing with the proper scope of the order with respect to labeling violations. In the following paragraphs, we suggest two changes and state reasons therefor.

A. The second issue herein is whether the Commission properly included in its cease and desist order specific proscription of labeling deficiencies which it found had not been committed. It was found that certain labeling omissions had occurred. The quality and character of those omissions may aid in estimating the probability of occurrence of other omissions which had not previously occurred, and thus may bear upon the propriety of enjoining omissions of the latter type. Accordingly, the respondent would amplify the first sentence in the first full paragraph on page 5 of the petition so as to set forth the following information:

The Commission found 12 instances of failure to label the product with the correct name of the animal producing the fur. They consisted of garments which were labeled "black seal" or "Alaska seal" instead of "fur seal"; "Persian" instead of "Persian lamb"; "tropical seal" instead of "hair seal"; and "Stuart hybrid" or "silver blue" instead of "mink." On one "dyed fox" garment, the species of fox was not named. (App. 18, 19)

The Commission found 15 instances of failure to disclose that the product was bleached, dyed or otherwise artificially colored. They included garments which were labeled as "black seal" or "black Persian lamb" without reference to having been dyed; there was testimony that those furs are not used commercially in black in their natural state, but are invariably dyed. Five muskrat coats bore no reference to having been dyed. Four mole jackets were labeled as "tipped" instead of "dyed" or "tip dyed." (App. 20)

The Commission found 58 instances of failure to show the country of origin of imported furs. These consisted of about 15 cases where fur origin was omitted; a few garments on which the fur origin was stated in adjective form, e.g., "Russian" instead of "fur origin: Russia"; and 37 coats on which the fur origin was stated as "Outer Mongolia." The criticism on the last group was that Outer Mongolia is not a country but is a part of China.* (App. 19, 20)

---

*Compare the Commission's Rule 12(b): "The term 'country' means the political entity known as a nation. Colonies, possessions or protectorates outside the boundaries of the mother country shall be considered separate countries and the name thereof shall be

B. The first sentence in the first full paragraph on page 6 of the petition, describing the cease and desist order, may fail to make it clear that the order proceeded to name each of the six categories of information without which a label is deficient, i.e., the three in which deficiencies had been found and also the three in which deficiencies had been not found. In the interest of complete accuracy, that sentence should read:

> Although the examiner recommended that the cease and desist order be limited to the three categories of information found to have been omitted, the Commission's order directed respondent to cease and desist from "Misbranding fur products by: 1. Failing to affix labels to fur products showing: * * *" followed by a particularization of each of the six categories of information required by section 4 (2) of the Act.

ARGUMENT

I

The court below properly held that the mandatory invoicing requirements of the Fur Products Labeling Act do not extend to retail sale slips.

The sale slip which a customer may receive at the time of a retail purchase in a department store certainly does not fall within the common concept of the term "invoice." That term is ordinarily used at wholly different stages of the commercial process.

Correspondingly, a retail sale slip does not fall within the Fur Act's definition of "invoice." Section 2(f) of that Act (15 U.S.C. 69(f)) provides:

---

deemed acceptable in designating the 'country of origin' unless the Commission shall otherwise direct." (Rules and Regulations under the Fur Products Labeling Act, Title 16 C.F.R. 301.)

> The term "invoice" means a written account, memorandum, list, or catalog, which is issued *in connection with any commercial dealing* in fur products or furs, and describes the particulars of any fur products or furs, transported or delivered to a *purchaser,* consignee, factor, bailee, correspondent, or agent, or *any other person* who is engaged in *dealing commercially* in fur products or furs. (Emphasis supplied.)

This definition is specific. Its plain meaning is that there is a statutory invoice only where the purchaser (or consignee, etc.) is a person who is dealing commercially. The qualification on the nature of the transaction is emphasized by the repetition of the "commercial" phrase. The statute requires not only that the invoice be a writing issued in connection with commercial dealing, but it must also be issued to a person who is dealing commercially. If unlimited scope had been desired, the definition could have been greatly simplified. But the very completeness of its detail demonstrates a design to apply to a narrow class.

That clear language of the definition is wholly consonant with the Act's purpose to protect the consumer from deception in her purchase of fur products. The scheme of the Act is to insure that complete and correct information is available to her at the point of purchase—it requires that the garment carry a fully detailed label.

The retail purchaser's protection is the label on the fur product. She has the garment before her, she has had an opportunity to see the label, and she has decided upon the purchase—all before the sale slip is prepared. The sale has been agreed upon and the transaction is concluded. The sale slip can add nothing to

her knowledge of the garment; its only function for her will be in connection with paying the bill.

On the other hand, a useful purpose may be served by application of the invoicing requirements to the chain of transactions whereby the goods come to the retailer. With the required information before him on the invoice, the retailer is in a position to see that a proper label is affixed to the garment.

We submit, therefore, that the Act's definition of invoice does not include the sale slip which may be given at the time of the purchase to the ultimate consumer.

The court below found no room for doubt, but declared the Fur Act's definition of invoice to be "plain and unambiguous." The court aptly said:

> * * * when the statute says purchaser or any *other* person who is so engaged [in dealing commercially in fur products or furs] the limitation clearly applies to *purchaser*. No other meaning is possible particularly when "invoice" is also defined by the Act as something *which is issued in connection with any commercial dealing* in fur products or furs. (Appendix A to petition for certiorari, p. 20.)

A sale slip at the retailer-customer level is not an invoice within the Act.

The Court of Appeals held the statutory meaning to be so clear as to preclude resort to legislative history. However, even if the history of the Fur Products Labeling Act were deemed pertinent, it would be found to give strong support to the conclusion which that court reached. The history demonstrates an intent in complete harmony with the interpretation which the

court below gave to "invoice." From its very inception, the legislation is described as putting its major emphasis on the invoicing of furs (not yet manufactured into garments) and on the labeling of fur products.

The Fur Act which became law in the 82d Congress had its precursor in H.R. 3734 in the 80th Congress. The House Committee on Interstate and Foreign Commerce held hearings and reported the bill, but matters went no further in that session. In the 81st Congress, bills quite similar to the present Act, H.R. 97 and H.R. 3755, were the subject of hearings by the same Committee, and a "clean" bill, H.R. 5187, was reported out. It passed the House, was reported in the Senate, and stood on the Senate calendar at adjournment. In the 82d Congress, the bill was H.R. 2321. The same Committee held hearings, and the bill was reported and passed the House. Meantime, the Senate Committee on Interstate and Foreign Commerce had reported its own S. 508, similar to H. R. 5187 of the preceding Congress. The language of S. 508 was substituted in H.R. 2321 in the Senate and thus passed. After conference, it became the present Fur Products Labeling Act.

As we have pointed out, the first bill in the series was H.R. 3734, in the 80th Congress. The petition for certiorari, in a footnote on page 10, refers to discussions of invoicing in the hearing on that bill. The concluding witness at the hearing was Henry Miller, the Federal Trade Commission's Director of Trade Practice Conferences and Wool Act Administration. Mr. Miller testified as follows:

> Representations have been made here about the invoice. Now, having a good invoice is a help. I

feel, however, that it by no means can reach a situation as simply and as effectively as a tag.

An invoice is a thing that takes place after the sale has been consummated. It is locking the barn door after the horse has been stolen, in a way.

A label is prophylactic; it is preventive. The consumer comes in, and she sees a whole rack of coats there. She may be in doubt as to what she wants to buy. Some of them are not in doubt. Some come in there, and they ask for a particular type of coat. When they see the label they are apt to be apprised of the truth at the time.

It is important to them to have the truth before they actually make the contract to purchase.

With all due respect to the fact that a good invoice is a good thing to have, I feel that a good label on the product itself simply giving the truth is a more effective remedy.

It is not an easy thing for a retailer, a retail store, to sit down and execute an invoice for every purchase. A manufacturer sends invoices because he ships in quantity. But a retail store will make many sales during the day, and it would be rather irksome and cumbersome, I think—I fear—if the retail store were required to execute an invoice at every sale at the time of sale.

Someone may say, "They can mail the invoice a little later." That is possible. But there again, I say the whole thing involves considerable more effort, considerable more machinery, than to have a simple tag on the article itself. (Hearing before the House Committee on Interstate and Foreign Commerce on H.R. 3734, 80th Congress, at page 202.)

The Committee's report on that initial bill said:

With respect to furs, the information required by this legislation is to be passed on by the means

> of invoices. In respect to fur products, labeling is required which begins with the manufacturer of the fur product. Removal of the manufacturer's label is forbidden until the article reaches the ultimate consumer. (House Report No. 2004, 80th Congress, page 3.)

Four committee reports, in the 81st and 82d Congresses, describe the legislation as requiring:

> * * * mandatory invoicing of furs and labeling of fur products moving in interstate or foreign commerce * * *

or, a slightly different wording:

> * * * mandatory labeling of fur articles of wearing apparel and invoicing of furs moving in interstate or foreign commerce * * *. (House Report No. 919, 81st Congress, page 1; House Report No. 546, 82d Congress, pages 1-2; Senate Report No. 2378, 81st Congress, page 1; Senate Report No. 78, 82d Congress, page 2.)

The original author and sponsor of the fur legislation, Representative Joseph P. O'Hara, testified in 1951 at the hearings on the bill which was ultimately enacted. He said:

> The remedy suggested in this bill is the mandatory invoicing of furs and the mandatory labeling of fur products moving in interstate or foreign commerce under the usual name of the animal that produced the fur. (Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress, at page 13.)

Congressional committees customarily invite the interested agencies to comment on pending bills. During 1949 and 1951, the Federal Trade Commission

wrote no less than six reports to the committees analyzing and commenting on the various fur bills mentioned above. Each one of those reports describes the legislation as requiring labeling of fur products or articles of wearing apparel, and requiring "invoicing of furs." (Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 97 and H.R. 3755, 81st Congress, pages 28 and 30; Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 2321, 82d Congress, page 6; House Report No. 919, 81st Congress, pages 5 and 6; Senate Report No. 2378, 81st Congress, page 5; House Report No. 546, 82d Congress, page 5; Senate Report No. 78, 82d Congress, page 5.)

The foregoing history shows beyond question that the desired protection for the consumer was to be achieved by requiring a label on the fur product. Stress was laid on invoicing furs so that, when they were manufactured into a garment, the information would be available for a proper label.

Moreover, this historical background confirms the view which we expressed at the outset of this discussion, that the construction of the Act made by the Court of Appeals does not at all frustrate the purpose of the Act—to insure disclosure of essential facts to the consumer. A technically detailed label on the garment at the time of purchase offers needed information and valuable protection to the woman buying the garment. But a technically detailed invoice to her after the purchase has been made would add no benefit for her and would be a needless burden on the retailer.

The petition alleges that the construction of "invoice" by the court below will "substantially limit the protection against misbranding afforded by Congress to purchasers of fur products." (Petition, page 7). There is no discusison of how such a result might follow, and no explanation is apparent. The "protection against misbranding" is achieved in the Act by requiring that a fur product bear a *label* showing specified details about the garment. That requirement of a label is not affected by the holding that the sale slip does not have to set forth the details required to be shown on a statutory invoice.

The petition for certiorari relies on the claim that the Commission has consistently construed the statute's invoicing requirements to apply to the sale slip furnished by the retailer to the consumer upon the purchase of a fur product. When the Commission may have espoused that construction does not appear, but it is clear that such was not the view of the Commission while the legislation was under consideration in Congress. We have referred above to repeated reports from the Commission to Congressional committees, which reports uniformly described the legislation as requiring that furs be invoiced, but that fur products should be labeled. The consistent construction for which the petition contends does not exist.

Furthermore, even a consistent construction is of doubtful weight when it is unilateral and not tested by challenge. Almost all of the Fur Act proceedings instituted by the Commission have been closed by agreed orders. So far as we can learn, this case is the first one in which a respondent has seriously contested the present issue. This case is only the second Fur Act case to be litigated; the first one was *DeGorter* v.

Federal Trade Commission, 244 F. 2d 270, C.A. 9, which presented neither one of the issues here in controversy.

We submit that the court below correctly construed the Act, that its construction does not thwart the purposes of the Act, and that there is no question requiring review by this Court.

II

The second allegation of error in the petition has to do with the proper scope of the Commission's cease and desist order with respect to labeling of fur products.

Section 4(2) of the Fur Act (15 U.S.C. 69b) specifies six items which must appear on the label on a fur product: the animal name, in conformity with the official Name Guide; that the product contains used fur, when such is the fact; that the fur is dyed, when such is the fact; that the product contains inferior parts of fur, when such is the fact; the name or registered number of the manufacturer or vendor; and the country of origin of imported fur. The Commission found that there was no evidence that respondent had violated the Act by omitting disclosure of the presence of used fur or inferior parts of fur or omitting the name of the vendor. Yet it enjoined the omission of all six requirements, separately enumerating each one.

Respondent objected to the prohibition of violations of which it had been acquitted, not because it expects to commit those violations but because any prohibition in a cease and desist order inevitably means to the public that the prohibited violation has been committed. It is of major importance to Mandel Brothers

hat no order suggest that the store has sold garments ontaining used fur or inferior parts of fur and has oncealed the fact.

The Court of Appeals rejected so much of the Commission's order as directed respondent to cease omitting from labels the items which the Commission found had not been omitted.

At the outset of its discussion of this issue, the petition for certiorari incorrectly reflects the holding of the court below. The petition (at page 11) says that the court "erred in holding that Commission cease-and-desist orders under the Fur Products Labeling Act may prohibit only the particular types of misbranding * * * found to have been committed." The court below did not so hold.

In its opinion, the Court of Appeals said:

> * * * We find no difficulty in subscribing to the doctrine that a cease and desist order does not have to be limited to the illegal practice in the precise form it is found to exist or that those caught violating the Act must expect some fencing in but we cannot affirm an order requiring one to cease and desist from doing that which the Commission specifically found it did not do. Appendix A to petition for certiorari, pp. 18-19.)

The court specifically recognized that Commission orders do not have to be limited to the particular violations found to have been committed. The only limitation imposed by the court below is a narrow one—consonant with every fundamental of our jurisprudence—that the Commission may not enjoin one from doing what it has found one did not do. No legitimate scope of Commission orders is inhibited.

The Court of Appeals did not deny to the Commission its "wide discretion" in remedying unlawful practices disclosed in its proceedings; it did not limit the Commission "to prohibiting the illegal practice in the precise form in which it is found to have existed." It held merely that, where the unlawful or illegal practice was found not to have existed, the Commission could not enjoin it.

In view of the more serious nature of two of the violations of which respondent was acquitted, and the obvious effect on customers of a suggestion that they had occurred, it was perhaps an abuse of discretion for the Commission to enjoin them. Compare the holding in *Siegel Company* v. *Federal Trade Commission*, 327 U.S. 608, where this Court held that the Commission should have considered whether some change of name or some qualifying language would have been sufficient to satisfy the law and still not destroy Siegel's "Alpacuna" trade name. In the case at bar, the Commission made no finding of resemblance to the violations which were found proved, and no finding that past conduct threatened the committing in the future of violations found not to have been committed in the past.

It is quite impossible to see how the Court of Appeals decision on this point would impede the Commission in any proper function. The way is open for prohibiting whatever illegal activities may have been disclosed, together with related variations on those activities. The only "fencing in" of the Commission is that it may not require one "to cease and desist from doing that which the Commission specifically found it did not do."

The petition for certiorari argues at one point that the requirements of section 4(2) of the Act constitute "six categories of misbranding" and that they are so interrelated as to presage that a violator of some categories will, unless restrained, violate others. The Commission did not justify its order with any such forecast and made no finding which would support it. In view of the varying degrees of reprehensibility of the several categories, to assume such a prospect would be unwarranted. The occurrence of violations which are almost technical in quality affords no basis for sound expectation that there will occur other violations of a definitely misleading nature. Moreover, a respondent who is under an order to label properly, with specific enumeration of the three items wherein he has been found delinquent, is hardly likely to risk further proceedings by violating the other three categories in which he has once been found not remiss.

At another point, the petition contends that the six categories do not give rise to separate violations; that the failure to attach a label containing all of the data specified by section 4(2) of the Act is a unitary violation. If that be the correct interpretation, then it was superfluous for the Commission's order to enumerate all of the six categories; a proper order would have been to "cease and desist from misbranding fur products by failing to affix labels to fur products showing all of the information required by section 4(2) of the Fur Products Labeling Act." Such an order is not inhibited by the decision of the Court of Appeals herein, and the fact of its availability is a complete answer to any contention that the Commission is handicapped in enforcing the laws within its jurisdiction.

The petition, at page 13, complains that under the decision below the Commission would have to bring new proceedings to deal with subsequent violations not theretofore resorted to. But the advantage of avoiding "multiplicity of actions" cannot warrant the enjoining of violations at large, and *a fortiori* cannot warrant enjoining violations which were found not to have occurred. As this Court said in *National Labor Relations Board* v. *Express Publishing Company*, 312 U.S. 426, 433, 437:

> It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.
>
> * * *
>
> We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found.

The respondent submits that the court below did not err, that its holding will in no wise frustrate the purposes of the Fur Act or handicap the Commission in enforcing the Act, and that there is no question requiring review by this Court.

CONCLUSION

r the foregoing reasons, it is respectfully sub-
ed that the petition for a writ of certiorari should
enied.

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SUPREME COURT, U.S.
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No. 184

In the Supreme Court of the United States

October Term, 1958

Jersey Shore Corporation, Petitioner

v.

Marine Bancorp., Inc.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 234

FEDERAL TRADE COMMISSION, PETITIONER

v.

MANDEL BROTHERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

A short response is necessary to two arguments which respondent makes in its opposition brief on the issue of whether the invoicing provisions of the Fur Products Labeling Act are applicable to retail sales. We believe that respondent's other arguments on this issue, as well as its contentions with respect to the second question presented, have been fully met in our petition.

1. Respondent contends that the label on a fur product adequately protects consumers from deception (Br. Opp. 5–6), and that a retail invoice "would add no benefit for" them (*id.*, 10).

This contention, however, overlooks the temporary character of the "label" which is used to furnish the

information required by the Act. It is not a "label" in the ordinary understanding of the word—that is, a piece of cloth permanently affixed to the garment by sewing. On the contrary, the record indicates (Comm. Ex. 1, App. 57; Resp. Ex. 1, App. 117) that the "label" is no more than a tag which is temporarily attached to the garment, apparently by tying. Such a tag obviously is removed from the garment before it is worn, and it is likely to be discarded by the consumer. The invoice, on the other hand, constitutes the consumer's permanent record, and, in all probability, would commonly be retained long after the "label" had been destroyed.

2. Respondent also contends (Br. Opp. 6–10) that the legislative history of the Fur Products Labeling Act indicates that the "major emphasis" of the legislation was "on the invoicing of furs (not yet manufactured into garments) and on the labeling of fur products," and that this distinction supports the holding below that the Act's invoicing requirements are not applicable to fur products sold at the retail level.

This argument ignores the fact that most of the statutory provisions dealing with invoicing apply to fur products as well as furs. For example, Sections 3 (a) and 3 (b) prohibit the sale "of any fur product which is * * * deceptively advertised or invoiced," and Section 5 (b) sets forth the circumstances when "a fur product or fur shall be considered to be falsely or deceptively invoiced * * *." Furthermore, Section 2 (f) of the Act defines "invoice" as "a written account, memorandum * * * which is issued in con-

nection with any commercial dealing in *fur products or furs,* and describes the particulars of any *fur products or furs,* transported or delivered to a purchaser, consignee, * * * or any other person who is engaged in dealing commercially in *fur products or furs*" (emphasis added). Thus, while the main thrust of the Act may have been against mislabeling of fur products, Congress also outlawed false and deceptive invoicing of such products, and not just furs.

Indeed, petitioner's argument proves too much. If the invoicing provisions are applicable only to transactions involving furs, a retailer such as petitioner itself would not be entitled to receive invoices covering its purchases of fur products from manufacturers and wholesalers. Yet obviously such transactions are issued in connection with a "commercial dealing in fur products," and petitioner, as consignee, is a "person who is engaged in dealing commercially in fur products."

Petitioner relies upon testimony given before a House Committee hearing on a predecessor bill by a Commission official, Henry Miller (Br. Opp. 7–8). In that testimony, Miller stated that, although "having a good invoice is a help * * * it by no means can reach a situation as simply and as effectively as a tag"; and that he "fear[ed]" that it would be "rather irksome and cumbersome * * * if the retail store were required to execute an invoice at every sale at the time of sale." This testimony merely shows that, in Miller's opinion, "a good label * * * is a more effective remedy" than "a good invoice" (*id.*, p. 8). As pointed out in the petition (p. 10, n. 4), there was

also substantial testimony at that same hearing with respect to the need for requiring adequate retail invoicing. Congress adopted this latter view and, instead of treating retail labeling and retail invoicing as mutually exclusive remedies, gave "consumers" "protect[ion] * * * against deception * * * resulting from" either "misbranding * * * or false invoicing of fur products and furs * * *" (S. Rep. No. 78, 82d Cong., 1st sess., p. 1). In short, Congress did not restrict protection against false invoicing to purchasers of furs, but extended it also to "consumers * * * of fur products."

The holding of the Court of Appeals that the Act's prohibitions against false invoicing are not applicable to retail transactions would deny consumers a substantial part of the protection which Congress sought to give them.

The petition for certiorari should be granted.

Respectfully submitted.

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